

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 283

SENATORS CARMICHAEL (MR. PRESIDENT) AND PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Passed March 10, 2018; in effect 90 days from passage]

1 AN ACT to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended; to amend
2 and reenact §5A-3-10b, §5A-3-10c, §5A-3-10e, §5A-3-33d, §5A-3-33f, §5A-3-37, and
3 §5A-3-45 of said code; to amend said code by adding thereto a new section, designated
4 §5A-3-61; to amend and reenact §5G-1-3 and §5G-1-4 of said code; to amend and reenact
5 §6D-1-1 of said code; and to amend and reenact §18B-5-4 of said code, all relating
6 generally to procurement by state agencies; defining terms; authorizing competitive
7 bidding of certain open-ended repair and maintenance contracts; modifying use and
8 consideration of alternates in solicitations; prohibiting alternates from being accepted out
9 of order; modifying criteria to be considered in best value procurement awards; eliminating
10 sole source procurement; establishing direct award procurement requirements;
11 establishing prequalification agreements and their requirements and procedures;
12 authorizing agency delegated prequalification bidding and its procedure; increasing
13 certain cost limits from \$50,000 to \$1 million; authorizing awarding contracts without
14 competitive bidding if certain requirements are met; eliminating master contracts and
15 direct ordering process; expanding the scope of those who may be debarred; eliminating
16 preferences for resident vendors, vendors employing state residents, and veteran
17 residents; establishing the concept of “reciprocal preference” for an in-state vendor over
18 an out-of-state vendor from any state that gives or requires a preference to bidders from
19 that state and setting forth its requirements; providing certain preferences for purchases
20 of motor vehicles or construction and maintenance equipment and machinery used in
21 highway and other infrastructure projects; modifying the value determination of certain
22 motor vehicles that are to be sold; permitting funds from sale of surplus property be
23 deposited in alternate fund if original fund no longer exists; permitting spending units to
24 use a standardization process to purchase commodities and setting forth its requirements;
25 permitting an architectural or engineering firm to be selected without bidding if certain
26 conditions exist; increasing the cost of projects under which Division of Highways is

27 permitted to procure services of architectural and engineering firms under certain
28 provisions; increasing certain contract limits from \$100,000 to \$1 million for purposes of
29 disclosure; modifying provisions requiring disclosure of interested parties; requiring certain
30 reporting; removing preference requirements for higher education; and authorizing
31 rulemaking.

Be it enacted by the Legislature of West Virginia:

**CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE
GOVERNOR, SECRETARY OF STATE, AND ATTORNEY GENERAL;
BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES,
COMMISSIONS, OFFICES, PROGRAMS, ETC.**

ARTICLE 22. GOVERNMENT CONSTRUCTION CONTRACTS.

**§5-22-1. Bidding required; government construction contracts to go to lowest
qualified responsible bidder; procedures to be followed in awarding
government construction projects; penalties for violation of procedures and
requirements debarment; exceptions.**

1 (a) This section and the requirements in this section may be referred to as the West
2 Virginia Fairness in Competitive Bidding Act.

3 (b) As used in this section:

4 (1) "Lowest qualified responsible bidder" means the bidder that bids the lowest price and
5 that meets, at a minimum, all the following requirements in connection with the bidder's response
6 to the bid solicitation. The bidder shall certify that it:

7 (A) Is ready, able, and willing to timely furnish the labor and materials required to complete
8 the contract;

9 (B) Is in compliance with all applicable laws of the State of West Virginia; and

10 (C) Has supplied a valid bid bond or other surety authorized or approved by the contracting
11 public entity.

12 (2) "The state and its subdivisions" means the State of West Virginia, every political
13 subdivision thereof, every administrative entity that includes such a subdivision, all municipalities,
14 and all county boards of education.

15 (3) "State spending unit" means a department, agency, or institution of the state
16 government for which an appropriation is requested, or to which an appropriation is made by the
17 Legislature.

18 (4) "Alternates" means any additive options or alternative designs included in a solicitation
19 for competitive bids that are different from and priced separately from what is included in a base
20 bid.

21 (5) "Construction project" means a specifically identified scope of work involving the act,
22 trade, or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating,
23 reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure,
24 facility, road, or highway. Repair and maintenance of existing public improvements that are
25 recurring or ongoing in nature and that are not fully identified or known at any one time shall be
26 considered a construction project and procured according to this article on an open-ended basis,
27 so long as the work to be performed under the contract falls into a generally accepted single class,
28 or type, and bidders are notified of the open-ended nature of the work in the solicitation: *Provided*,
29 That no open-ended repair or maintenance contract may exceed \$500,000.

30 (c) The state and its subdivisions shall, except as provided in this section, solicit
31 competitive bids for every construction project exceeding \$25,000 in total cost.

32 (1) If a solicitation contains a request for any alternates, the alternates shall be listed
33 numerically in the order of preference in the solicitation.

34 (2) A vendor who has been debarred pursuant to §5A-3-33b through §5A-3-33f of this
35 code, may not bid on or be awarded a contract under this section.

36 (d) All bids submitted pursuant to this chapter shall include a valid bid bond or other surety
37 as approved by the State of West Virginia or its subdivisions.

38 (e) Following the solicitation of bids, the construction contract shall be awarded to the
39 lowest qualified responsible bidder who shall furnish a sufficient performance and payment bond.
40 The state and its subdivisions may reject all bids and solicit new bids on the project.

41 (f) Any solicitation of bids shall include no more than five alternates. Alternates, if
42 accepted, shall be accepted in the order in which they are listed on the bid form. Any unaccepted
43 alternate contained within a bid shall expire 90 days after the date of the opening of bids for
44 review.

45 Determination of the lowest qualified responsible bidder shall be based on the sum of the
46 base bid and any alternates accepted.

47 (g) The apparent low bidder on a contract valued at more than \$250,000 for the
48 construction, alteration, decoration, painting, or improvement of a new or existing building or
49 structure with a state spending unit shall submit a list of all subcontractors who will perform more
50 than \$25,000 worth of work on the project including labor and materials. This section does not
51 apply to other construction projects such as highway, mine reclamation, water, or sewer projects.
52 The list shall include the names of the bidders and the license numbers as required by §21-11-1
53 *et seq.* of this code. This information shall be provided to the state spending unit within one
54 business day of the opening of bids for review prior to the awarding of a construction contract. If
55 the apparent low bidder fails to submit the subcontractor list, the spending unit shall promptly
56 request by telephone and electronic mail that the low bidder and second low bidder provide the
57 subcontractor list within one business day of the request. Failure to submit the subcontractor list
58 within one business day of receiving the request shall result in disqualification of the bid. A
59 subcontractor list may not be required if the bidder provides notice in the bid submission or in
60 response to a request for a subcontractor list that no subcontractors who will perform more than
61 \$25,000 worth of work will be used to complete the project.

62 (h) Written approval must be obtained from the state spending unit before any
63 subcontractor substitution is permitted. Substitutions are not permitted unless:

64 (1) The subcontractor listed in the original bid has filed for bankruptcy;

65 (2) The state spending unit refuses to approve a subcontractor in the original bid because
66 the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under
67 §5A-3-32 of this code; or

68 (3) The contractor certifies in writing that the subcontractor listed in the original bill fails, is
69 unable, or refuses to perform the subcontract.

70 (i) The contracting public entity may not award the contract to a bidder which fails to meet
71 the minimum requirements set out in this section. As to a prospective low bidder which the
72 contracting public entity determines not to have met one or more of the requirements of this
73 section or other requirements as determined by the public entity in the written bid solicitation, prior
74 to the time a contract award is made, the contracting public entity shall document in writing and
75 in reasonable detail the basis for the determination and shall place the writing in the bid file. After
76 the award of a bid under this section, the bid file of the contracting public agency and all bids
77 submitted in response to the bid solicitation shall be open and available for public inspection.

78 (j) The contracting public entity shall not award a contract pursuant to this section to any
79 bidder that is known to be in default on any monetary obligation owed to the state or a political
80 subdivision of the state, including, but not limited to, obligations related to payroll taxes, property
81 taxes, sales and use taxes, fire service fees, or other fines or fees. Any governmental entity may
82 submit to the Division of Purchasing information which identifies vendors that qualify as being in
83 default on a monetary obligation to the entity. The contracting public entity shall take reasonable
84 steps to verify whether the lowest qualified bidder is in default pursuant to this subsection prior to
85 awarding a contract.

86 (k) A public official or other person who individually or together with others knowingly
87 makes an award of a contract under this section in violation of the procedures and requirements
88 of this section is subject to the penalties set forth in §5A-3-29 of this code.

89 (l) No officer or employee of this state or of a public agency, public authority, public
90 corporation, or other public entity and no person acting or purporting to act on behalf of an officer
91 or employee or public entity may require that a performance bond, payment bond, or surety bond
92 required or permitted by this section be obtained from a particular surety company, agent, broker,
93 or producer.

94 (m) All bids shall be open in accordance with the provisions of §5-22-2 of this code, except
95 design-build projects which are governed by §5-22A-1 *et seq.* of this code and are exempt from
96 these provisions.

97 (n) Nothing in this section applies to:

98 (1) Work performed on construction or repair projects by regular full-time employees of
99 the state or its subdivisions;

100 (2) Prevent students enrolled in vocational educational schools from being utilized in
101 construction or repair projects when the use is a part of the student's training program;

102 (3) Emergency repairs to building components, systems, and public infrastructure. For the
103 purpose of this subdivision, the term "emergency repairs" means repairs that if not made
104 immediately will seriously impair the use of building components, systems, and public
105 infrastructure or cause danger to persons using the building components, systems, and public
106 infrastructure; and

107 (4) A situation where the state or subdivision thereof reaches an agreement with
108 volunteers, or a volunteer group, in which the governmental body will provide construction or
109 repair materials, architectural, engineering, technical, or other professional services, and the
110 volunteers will provide the necessary labor without charge to, or liability upon, the governmental
111 body.

CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.

ARTICLE 3. PURCHASING DIVISION.

§5A-3-10b. Best value procurement.

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

3 (b) A solicitation for bids under best value procurement shall be made in the same manner
4 as provided in §5A-3-10 of this code.

5 (c) Best value procurement awards shall be based on criteria set forth in the solicitation
6 and information contained in the proposals submitted in response to the solicitation. Those criteria
7 include, but are not limited to, price and the total cost of acquiring, operating, maintaining, and
8 supporting a commodity or service over its projected lifetime, as well as technical criteria. The
9 technical criteria may include, but are not limited to, the evaluated technical merit of the bidder's
10 bid or proposal, the bidder's past performance, the degree to which a proposal exceeds other
11 proposals in technical merit, the utility of any novel or unrequested items in the proposal, and the
12 evaluated probability of performing the requirements stated in the solicitation on time, with high
13 quality, and in a manner that accomplishes the business objectives set forth in the solicitation.

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

17 (e) The director may not use best value procurement to enter into government construction
18 contracts, including, but not limited to, those set forth in §5-22-1 *et seq.* of this code.

§5A-3-10c. Direct award procurement.

1
2 (a) The director may make a direct award of a contract without competitive bidding if:

3 (1) The spending unit requests a direct award in writing;

4 (2) The spending unit provides written justification showing that the direct award is in the
5 best interest of the state;

6 (3) The spending unit provides written confirmation that competition is not available
7 because there is no other source for the commodity or service, or that no other source would be
8 willing or able to replace the existing source without a detrimental effect on the spending unit, the
9 existence of a detrimental effect being determined by the director in his or her sole discretion;

10 (4) The director publicly advertises a notice of intent to make a direct award without
11 competition in the state's official bid notification system, as well as any other public advertisement
12 that the director deems appropriate, for no less than 10 business days; and

13 (5) No other vendor expresses an interest in providing the commodity or service in
14 question.

15 (b) If a vendor expresses an interest in providing the commodity or service described in
16 the notice of intent to make a direct award, then the spending unit must convert the direct award
17 to a competitive bid, unless the director determines that the interest expressed by a vendor is
18 unreasonable. The competitive bid may, at the discretion of the director, be either a request for
19 quotation or request for proposal.

20 (c) The notice of intent to make a direct award shall contain the following information:

21 (1) A description of the commodity or service for which a direct award will be made;

22 (2) A time period by which delivery must be made or performance must occur;

23 (3) The price that will be paid for the commodity or service;

24 (4) Any limitations that a competing vendor would need to satisfy;

25 (5) An invitation to all vendors interested in providing the commodity or service to make
26 that interest known; and

27 (6) Contact information for the director or his or her designee, and instructions to submit
28 a statement of interest to the director or his or her designee.

29 (d) The director may refuse a spending unit's request to utilize a direct award procurement
30 if the commodities or services have previously been obtained through competitive bidding.

31 (e) On or before December 1, 2018, and annually thereafter, the director shall report to
32 the Governor and the Joint Committee on Government and Finance on the spending units that
33 have requested a direct award for their commodities or services, the type of commodity or service,
34 and results of the direct award process.

§5A-3-10e. Prequalification agreement; agency- delegated bidding.

1 (a) Subject to the limitations of this section, the director may permit spending units to
2 procure commodities from a preapproved vendor through a prequalification agreement and
3 delegated prequalification bidding if the director determines the process is fair, economical, and
4 in the best interests of the state.

5 (b) *Definitions.* — For purposes of this section:

6 (1) "Information technology" means hardware and software related to electronic
7 processing, and storage, retrieval, transmittal, and manipulation of data.

8 (2) "Prequalification agreement" means an agreement, having a term of no more than
9 three years, between the Purchasing Division and at least two prequalified vendors authorizing a
10 spending unit to purchase a commodity on a recurrent basis through the delegated
11 prequalification bidding process defined in the prequalification agreement.

12 (3) "Prequalified vendor" means a "vendor", as that term is defined in §5A-1-1 of this code,
13 that has entered into a prequalification agreement with the Purchasing Division and may
14 participate in the delegated prequalification bidding subject to the terms and conditions of the
15 prequalification agreement.

16 (4) "Delegated prequalification bidding" means the competitive bidding process whereby
17 the prequalified vendors that are parties to a prequalification agreement may submit sealed bids
18 directly to spending units to provide a commodity identified in the prequalification agreement
19 subject to the limitations set forth in this section.

20 (c) *Prequalification agreement.* —

21 (1) For each prequalification agreement, the director shall set forth the requirements,
22 technical or otherwise, under which a vendor may be qualified to supply a commodity through the
23 delegated prequalification bidding. For each prequalification agreement, the director shall follow
24 the notice and advertising requirements set forth in §5A-3-10 of this code.

25 (2) A prequalification agreement may authorize the delegated prequalification bidding for
26 only one type of commodity.

27 (3) A vendor may submit information to the director to establish that it meets the
28 requirements set forth in the prequalification agreement.

29 (4) If the director determines that a vendor meets the requirements set forth in the
30 prequalification agreement, the vendor may enter into the prequalification agreement as a
31 prequalified vendor.

32 (d) *Delegated prequalification bidding procedures.* —

33 (1) A spending unit may commence the delegated prequalification bidding process by
34 issuing a request for a commodity identified in the prequalification agreement stating in the
35 request the quantity of the commodity to be procured.

36 (2) The prequalified vendor that submits the lowest bid in response to the request shall be
37 awarded the procurement.

38 (3) The delegated prequalification bidding may not be utilized for any request for
39 commodities anticipated to cost more than \$1 million, unless approved in writing by the Director
40 of Purchasing. The state may not issue a series of orders each anticipated to cost less than \$1
41 million to circumvent the monetary limitation in this subsection. The limit expressed herein applies
42 to each delegated prequalification bid conducted pursuant to the prequalification agreement and
43 not to total spending under the prequalification agreement.

44 (e) *Rule-making authority.* — The Director of the Purchasing Division shall propose rules
45 for legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code to
46 implement this section, including, but not limited to, provisions to establish procedures for the
47 solicitation and authorization of prequalification agreements, prequalification of vendors, and
48 implementation of delegated prequalification bidding.

§5A-3-33d. Grounds for debarment.

1 (a) Grounds for debarment are:

2 (1) Conviction of an offense involving fraud or a felony offense related to obtaining or
3 attempting to obtain a public contract or subcontract;

4 (2) Conviction of any federal or state antitrust statute relating to the submission of offers;

5 (3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification,
6 or destruction of records, making false statements, or receiving stolen property related to the
7 performance of a contract;

8 (4) Conviction of a felony offense demonstrating a lack of business integrity or business
9 honesty that affects the present responsibility of the vendor or subcontractor;

10 (5) Default on obligations owed to the state, including, but not limited to, obligations owed
11 to the workers' compensation funds, as defined in §23-2C-1 *et seq.* of this code, and obligations
12 under the West Virginia Unemployment Compensation Act and West Virginia state tax and
13 revenue laws. For purposes of this subdivision, a vendor is in default when, after due notice, the
14 vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into
15 a repayment agreement with the appropriate agency of the state or has entered into a repayment
16 agreement but does not remain in compliance with its obligations under the repayment
17 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a
18 vendor granted an exemption under any rule of the Bureau of Employment Programs or the
19 Insurance Commission, the director may waive debarment under §5A-3-33f of this code:
20 *Provided,* That in no event may debarment be waived with respect to any vendor who has not

21 paid all current state obligations for at least the four most recent calendar quarters, excluding the
22 current calendar quarter, or with respect to any vendor who is in default on a repayment
23 agreement with an agency of the state;

24 (6) The vendor is not in good standing with a licensing board, in that the vendor is not
25 licensed when licensure is required by the law of this state, or the vendor has been found to be
26 in violation of an applicable licensing law after notice, opportunity to be heard, and other due
27 process required by law;

28 (7) The vendor is an active and knowing participant in dividing or planning procurements
29 to circumvent the \$25,000 threshold requiring a sealed bid or otherwise avoiding the use of a
30 sealed bid;

31 (8) Violation of the terms of a public contract or subcontract for:

32 (A) Willful failure to substantially perform in accordance with the terms of one or more
33 public contracts;

34 (B) Performance in violation of standards established by law or generally accepted
35 standards of the trade or profession amounting to intentionally deficient or grossly negligent
36 performance on one or more public contracts;

37 (C) Use of substandard materials on one or more public contracts or defects in
38 construction in one or more public construction projects amounting to intentionally deficient or
39 grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a
40 construction project and expiration of any warranty thereunder; or

41 (D) A repeated pattern or practice of failure to perform so serious and compelling as to
42 justify debarment; or

43 (9) Any other cause of a serious and compelling nature amounting to knowing and willful
44 misconduct of the vendor that demonstrates a wanton indifference to the interests of the public
45 and that caused, or that had a substantial likelihood of causing, serious harm to the public.

46 (b) For the purposes of this section, the term “conviction” includes, but may not be limited
47 to, the entering of a deferred prosecution agreement or a plea of guilty or nolo contendere,
48 including pleading to a lesser or related offense in exchange for some form of prosecutorial
49 leniency.

§5A-3-33f. Effects of debarment.

1 (a) Unless the director determines in writing that there is a compelling reason to do
2 otherwise, the state and its subdivisions may not solicit offers from, award contracts to, nor
3 consent to subcontract with a debarred vendor during the debarment period.

4 (b) The contracting officer may not exercise an option to renew or otherwise extend a
5 current contract with a debarred vendor, nor a contract which is being performed in any part by a
6 debarred subcontractor, unless the director approves the action in writing, based on compelling
7 reasons for exercise of the option or extension.

8 (c) The debarment decision may extend to all commodities and services of the vendor, or
9 may be limited to specific commodities or services, as the director specifically finds, in the
10 debarment procedure under §5A-3-33e of this code, to be in the public interest based on the
11 substantial record.

12 (d) The director may extend the debarment to include a related party of the vendor. The
13 director shall follow the same procedure, and afford the affiliate like notice, hearing, and other
14 rights, for extending the debarment to the affiliate as provided for under §5A-3-33e of this code
15 for the debarment of the vendor. For purposes of this section, a “related party” may include:

16 (1) Spouses, parents, children, siblings, grandparents, or grandchildren of a debarred
17 vendor or individual;

18 (2) Any individual or entity that partially or completely owns, controls, or influences, or is
19 partially or completely owned, controlled, or influenced by the actions of a debarred vendor or
20 individual;

21 (3) Entities that are related under common ownership or control with a debarred vendor;

22 or

23 (4) A business entity or individual that has contracted with or employed a debarred vendor

24 or individual to perform work on one or more public contracts.

25 (e) The director may reduce the period or extent of debarment, upon the vendor's request

26 supported by documentation, for the following reasons:

27 (1) Newly discovered material evidence;

28 (2) Reversal of the conviction or judgment upon which debarment was based;

29 (3) Elimination of the causes for which the debarment was imposed; or

30 (4) Other good cause shown, including evidence that the vendor has become responsible.

31 (f) The director may extend the debarment period for an additional period if the director

32 determines that the extension is necessary to protect the interests of the state. Upon the expiration

33 of a debarment period, the director shall extend the debarment period for any vendor who has not

34 paid all current state obligations for at least the four most recent calendar quarters, exempting the

35 current calendar quarter, and for any vendor who is in default on a repayment agreement with an

36 agency of the state, until such time as the cause for the extended debarment is removed. If the

37 director extends the debarment period, the director shall follow the same procedures, and afford

38 the vendor like notice, hearing, and other rights for extending the debarment, as provided for

39 debarment under §5A-3-33e of this code.

40 (g) A debarment under this article may be waived by the director with respect to a particular

41 contract if the director determines the debarment of the vendor would severely disrupt the

42 operation of a governmental entity to the detriment of the general public or would not be in the

43 public interest.

§5A-3-37. Reciprocal preference; preference for resident vendors for certain contracts.

1 (a) For purposes of this section, a vendor shall be deemed to be a resident of this state if

2 such vendor:

3 (1) Is registered in accordance with §11-12-1 *et seq.* of this code to transact business
4 within the State of West Virginia;

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

6 (3) Has actually paid, and not just applied to pay, personal property taxes imposed by
7 chapter 11 of this code on equipment used in the regular course of supplying services or
8 commodities of the general type offered; and

9 (4) Has actually paid, and not just applied to pay, all required business taxes imposed by
10 chapter 11 of this code.

11 (b) Except as provided in §5A-3-37(c) of this code, in any instance that a purchase of
12 commodities or printing by the director or by a state spending unit is required under the provisions
13 of this article to be made upon competitive bids, preference shall only be given to resident vendors
14 of West Virginia against a nonresident vendor from any state that gives or requires a preference
15 to bidders from that state. The amount of the preference shall be equal to the amount of the
16 preference given or required by the state of the nonresident vendor for that particular supply.

17 (c)(1) In any instance that a purchase of motor vehicles or construction and maintenance
18 equipment and machinery used in highway and other infrastructure projects by the director or by
19 a state department is required under the provisions of this article to be made upon competitive
20 bids, the successful bid shall be determined as provided in this subsection.

21 (2) For purposes of this subsection, a successful bid shall be determined and accepted as
22 follows:

23 (A) From an individual resident vendor who has resided in West Virginia continuously for
24 the four years immediately preceding the date on which the bid is submitted or from a partnership,
25 association, corporation resident vendor, or from a corporation nonresident vendor which has an
26 affiliate or subsidiary which employs a minimum of 100 state residents and which has maintained
27 its headquarters or principal place of business within West Virginia continuously for four years
28 immediately preceding the date on which the bid is submitted, if the vendor's bid does not exceed

29 the lowest qualified bid from a nonresident vendor by more than two and one-half percent of the
30 latter bid, and if the vendor has made written claim for the preference at the time the bid was
31 submitted: *Provided*, That for purposes of this paragraph, any partnership, association, or
32 corporation resident vendor of this state which does not meet the requirements of this paragraph
33 solely because of the continuous four-year residence requirement, shall be considered to meet
34 the requirement if at least 80 percent of the ownership interest of the resident vendor is held by
35 another individual, partnership, association, or corporation resident vendor who otherwise meets
36 the requirements of this paragraph, including the continuous four-year residency requirement:
37 *Provided, however*, That the Purchasing Division shall promulgate rules relating to attribution of
38 ownership among several resident vendors for purposes of determining the 80 percent ownership
39 requirement; or

40 (B) From a resident vendor, if, for purposes of producing or distributing the motor vehicles
41 or the construction and maintenance equipment and machinery used in highway and other
42 infrastructure projects which are the subject of the vendor's bid and continuously over the entire
43 term of the contract, on average at least 75 percent of the vendor's employees are residents of
44 West Virginia who have resided in the state continuously for the two immediately preceding years,
45 and the vendor's bid does not exceed the lowest qualified bid from a nonresident vendor by more
46 than two and one-half percent of the latter bid, and if the vendor has certified the residency
47 requirements of this paragraph and made written claim for the preference, at the time the bid was
48 submitted; or

49 (C) From a nonresident vendor, which employs a minimum of 100 state residents or a
50 nonresident vendor which has an affiliate or subsidiary which maintains its headquarters or
51 principal place of business within West Virginia and which employs a minimum of 100 state
52 residents, if, for purposes of producing or distributing the motor vehicles or the construction and
53 maintenance equipment and machinery used in highway and other infrastructure projects which
54 are the subject of the vendor's bid and continuously over the entire term of the contract, on

55 average at least 75 percent of the vendor's employees or the vendor's affiliate's or subsidiary's
56 employees are residents of West Virginia who have resided in the state continuously for the two
57 immediately preceding years and the vendor's bid does not exceed the lowest qualified bid from
58 a nonresident vendor by more than two and one-half percent of the latter bid, and if the vendor
59 has certified the residency requirements of this paragraph and made written claim for the
60 preference, at the time the bid was submitted; or

61 (D) From a vendor who meets either the requirements of both §5A-3-37(c)(2)(A) and §5A-
62 3-37(c)(2)(B) of this code or §5A-3-37(c)(2)(A) and §5A-3-37(c)(2)(C) of this code, if the bid does
63 not exceed the lowest qualified bid from a nonresident vendor by more than five percent of the
64 latter bid, and if the vendor has certified the residency requirements above and made written claim
65 for the preference at the time the bid was submitted; or

66 (E) From an individual resident vendor who is a veteran of the United States armed forces,
67 the reserves or the National Guard and has resided in West Virginia continuously for the four
68 years immediately preceding the date on which the bid is submitted, if the vendor's bid does not
69 exceed the lowest qualified bid from a nonresident vendor by more than three and one-half
70 percent of the latter bid, and if the vendor has made written claim for the preference at the time
71 the bid was submitted; or

72 (F) From a resident vendor who is a veteran of the United States armed forces, the
73 reserves or the National Guard, if, for purposes of producing or distributing motor vehicles or
74 construction and maintenance equipment and machinery used in highway and other infrastructure
75 projects which are the subject of the vendor's bid and continuously over the entire term of the
76 contract, on average at least 75 percent of the vendor's employees are residents of West Virginia
77 who have resided in the state continuously for the two immediately preceding years and the
78 vendor's bid does not exceed the lowest qualified bid from a nonresident vendor by more than
79 three and one-half percent of the latter bid, and if the vendor has certified the residency

80 requirements of this paragraph and made written claim for the preference, at the time the bid was
81 submitted; or

82 (G) Notwithstanding any provisions of §5A-3-37(c)(2)(A), §5A-3-37(c)(2)(B), §5A-3-
83 37(c)(2)(C), §5A-3-37(c)(2)(D), §5A-3-37(c)(2)(E), or §5A-3-37(c)(2)(F) of this code to the
84 contrary, if any nonresident vendor that is bidding on the purchase of motor vehicles or
85 construction and maintenance equipment and machinery used in highway and other infrastructure
86 projects by the director or by a state department is also certified as a small-, women-, or minority-
87 owned business pursuant to §5A-3-59, the nonresident vendor shall be provided the same
88 preference made available to any resident vendor under the provisions of this subdivision.

89 (3) If any of the requirements or provisions set forth in this section jeopardize the receipt
90 of federal funds, then the requirement or provisions are void and of no force and effect for that
91 specific project.

92 (4) The Purchasing Division shall promulgate any rules necessary to: (A) Determine that
93 vendors have met the residence requirements described in this section; (B) establish the
94 procedure for vendors to certify the residency requirements at the time of submitting their bids;
95 (C) establish a procedure to audit bids which make a claim for preference permitted by this section
96 and to reject noncomplying bids; and (D) otherwise accomplish the objectives of this subsection.

97 (d) If the Purchasing Division determines under any audit procedure that a vendor who
98 received a preference under this section fails to continue to meet the requirements for the
99 preference at any time during the term of the contract for which the preference was received the
100 Purchasing Division may: (1) Reject the vendor's bid; or (2) assess a penalty against the vendor
101 of not more than five percent of the vendor's bid on the contract.

102 (e) Political subdivisions of the state including county boards of education may grant the
103 same preferences to any vendor of this state who has made a written claim for the preference at
104 the time a bid is submitted, but for the purposes of this subsection, in determining the lowest bid,
105 any political subdivision shall exclude from the bid the amount of business occupation taxes which

106 must be paid by a resident vendor to any municipality within the county comprising or located
107 within the political subdivision as a result of being awarded the contract which is the object of the
108 bid; in the case of a bid received by a municipality, the municipality shall exclude only the business
109 and occupation taxes as will be paid to the municipality: *Provided*, That prior to soliciting any
110 competitive bids, any political subdivision may, by majority vote of all its members in a public
111 meeting where all the votes are recorded, elect not to exclude from the bid the amount of business
112 and occupation taxes as provided in this subsection.

**§5A-3-45. Disposition of surplus state property; semiannual report; application of
proceeds from sale.**

1 (a) The state agency for surplus property has the exclusive power and authority to make
2 disposition of commodities or expendable commodities now owned or in the future acquired by
3 the state when the commodities are or become obsolete or unusable or are not being used or
4 should be replaced.

5 (b) The agency shall determine what commodities or expendable commodities should be
6 disposed of and make disposition in the manner which will be most advantageous to the state.
7 The disposition may include:

8 (1) Transferring the particular commodities or expendable commodities between
9 departments;

10 (2) Selling the commodities to county commissions, county boards of education,
11 municipalities, public service districts, county building commissions, airport authorities, parks and
12 recreation commissions, nonprofit domestic corporations qualified as tax exempt under Section
13 501(c)(3) of the Internal Revenue Code of 1986, as amended, or volunteer fire departments in
14 this state when the volunteer fire departments have been held exempt from taxation under Section
15 501(c) of the Internal Revenue Code 1986, as amended;

16 (3) Trading in the commodities as a part payment on the purchase of new commodities;

17 (4) Cannibalizing the commodities pursuant to procedures established under §5A-3-45(g)
18 of this code;

19 (5) Properly disposing of the commodities as waste;

20 (6) Selling the commodities to the general public at the posted price or to the highest
21 bidder by means of public auctions or sealed bids, after having first advertised the time, terms,
22 and place of the sale as a Class II legal advertisement in compliance with the provisions of §59-
23 3-1 *et seq.* of this code. The publication area for the publication is the county in which the sale is
24 to be conducted. The sale may also be advertised in other advertising media that the agency
25 considers advisable. The agency may sell to the highest bidder or to any one or more of the
26 highest bidders, if there is more than one, or, if the best interest of the state will be served, reject
27 all bids; or

28 (7) Selling the commodities to the highest bidder by means of an Internet auction site
29 approved by the director, as set forth in a legislative rule pursuant to the provisions of chapter
30 29A of this code.

31 (c) Upon the sale to the general public or transfer of commodities or expendable
32 commodities between departments, or upon the sale of commodities or expendable commodities
33 to an eligible organization, the agency shall set the price to be paid by the receiving eligible
34 organization, with due consideration given to current market prices.

35 (d) The agency may sell expendable, obsolete, or unused motor vehicles owned by the
36 state to an eligible organization, other than volunteer fire departments. In addition, the agency
37 may sell expendable, obsolete, or unused motor vehicles owned by the state with a gross weight
38 in excess of 4,000 pounds to an eligible volunteer fire department. The agency, with due
39 consideration given to fair market value as determined by an independent automotive pricing
40 guide, shall set the price at a fair market price to be paid by the receiving eligible organization for
41 motor vehicles sold pursuant to this provision. The fair market value shall be based on a thorough
42 inspection of the vehicle by an employee of the agency who shall consider the mileage of the

43 vehicle and the condition of the body, engine, and tires as indicators of its fair market value. If no
44 fair market value is available, the agency shall set the price to be paid by the receiving eligible
45 organization with due consideration given to current market prices. The duly authorized
46 representative of the eligible organization, for whom the motor vehicle or other similar surplus
47 equipment is purchased or otherwise obtained, shall cause ownership and proper title to the motor
48 vehicle to be vested only in the official name of the authorized governing body for whom the
49 purchase or transfer was made. The ownership or title, or both, shall remain in the possession of
50 that governing body and be nontransferable for a period of not less than one year from the date
51 of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment
52 prior to an elapsed period of one year may be made only by reason of certified unserviceability.

53 (e) The agency shall report to the Legislative Auditor, semiannually, all sales of
54 commodities or expendable commodities made during the preceding six months to eligible
55 organizations. The report shall include a description of the commodities sold, the price paid by
56 the eligible organization which received the commodities, and to whom each commodity was sold.

57 (f) The proceeds of the sales or transfers shall be deposited in the State Treasury to the
58 credit on a pro rata basis of the fund or funds out of which the purchase of the particular
59 commodities or expendable commodities was made: *Provided*, That the agency may charge and
60 assess fees reasonably related to the costs of care and handling with respect to the transfer,
61 warehousing, sale, and distribution of state property disposed of or sold pursuant to the provisions
62 of this section. Notwithstanding §5A-3-45(e) of this code, if the fund or funds out of which the
63 purchase was made no longer exist, the spending unit may designate an alternate fund within
64 which the proceeds must be deposited.

65 (g)(1) For purposes of this section, "cannibalization" means the removal of parts from one
66 commodity to use in the creation or repair of another commodity.

67 (2) The Director of the Purchasing Division shall propose for promulgation legislative rules
68 to establish procedures that permit the cannibalization of a commodity when it is in the best

69 interests of the state. The procedures shall require the approval of the director prior to the
70 cannibalization of the commodity under such circumstances as the procedures may prescribe.

71 (3)(A) Under circumstances prescribed by the procedures, state agencies shall be
72 required to submit a form, in writing or electronically, that, at a minimum, elicits the following
73 information for the commodity the agency is requesting to cannibalize:

- 74 (i) The commodity identification number;
- 75 (ii) The commodity's acquisition date;
- 76 (iii) The commodity's acquisition cost;
- 77 (iv) A description of the commodity;
- 78 (v) Whether the commodity is operable and, if so, how well it operates;
- 79 (vi) How the agency will dispose of the remaining parts of the commodity; and
- 80 (vii) Who will cannibalize the commodity and how the person is qualified to remove and
81 reinstall the parts.

82 (B) If the agency has immediate plans to use the cannibalized parts, the form shall elicit
83 the following information for the commodity or commodities that will receive the cannibalized part
84 or parts:

- 85 (i) The commodity identification number;
- 86 (ii) The commodity's acquisition date;
- 87 (iii) The commodity's acquisition cost;
- 88 (iv) A description of the commodity;
- 89 (v) Whether the commodity is operable;
- 90 (vi) Whether the part restores the commodity to an operable condition; and
- 91 (vii) The cost of the parts and labor to restore the commodity to an operable condition
92 without cannibalization.

93 (C) If the agency intends to retain the cannibalized parts for future use, it shall provide
94 information justifying its request.

95 (D) The procedures shall provide for the disposal of the residual components of
96 cannibalized property.

97 (h)(1) The Director of the Purchasing Division shall propose for promulgation legislative
98 rules to establish procedures that allow state agencies to dispose of commodities in a landfill, or
99 by other lawful means of waste disposal, if the value of the commodity is less than the benefit that
100 may be realized by the state by disposing of the commodity using another method authorized in
101 this section. The procedures shall specify circumstances where the state agency for surplus
102 property shall inspect the condition of the commodity prior to authorizing the disposal and those
103 circumstances when the inspection is not necessary prior to the authorization.

104 (2) Whenever a state agency requests permission to dispose of a commodity in a landfill,
105 or by other lawful means of waste disposal, the state agency for surplus property has the right to
106 take possession of the commodity and to dispose of the commodity using any other method
107 authorized in this section.

108 (3) If the state agency for surplus property determines, within 15 days of receiving a
109 commodity, that disposing of the commodity in a landfill or by other lawful means of waste disposal
110 would be more beneficial to the state than disposing of the commodity using any other method
111 authorized in this section, the cost of the disposal is the responsibility of the agency from which it
112 received the commodity.

§5A-3-61. Standardization.

1 (a) Notwithstanding any provision in this article to the contrary, a spending unit may utilize
2 the process described in this section to standardize purchases of commodities used by the
3 spending unit on a repeated basis. Such standardization may result in a determination that only
4 a specific brand name for the commodity in question will be used.

5 (b) Standardization is limited to commodities that represent a core function of the spending
6 unit's mission; would yield a savings of time and money if standardized; and either require testing
7 or evaluation to determine accuracy or consistency or require interoperability in a larger system

8 or network. Savings of time and money must be shown without considering the traditional
9 procurement process or the standardization process.

10 (c) Any standardization established under this section shall be valid for no more than four
11 years. Upon expiration, the spending unit establishing the standardization may either take no
12 action, which would allow the standardization to end, or undertake the process outlined in this
13 section to establish a new standard.

14 (d) A spending unit desiring to establish a standard must use the following procedure:

15 (1) The head of the spending unit must identify the commodity to be standardized and
16 request approval from the director to establish a standard. The head of the spending unit shall
17 provide to the director written certification and supporting evidence verifying that the requirements
18 for standardization have been met.

19 (2) The spending unit must identify the individual or individuals that will be evaluating the
20 commodity for standardization. Each individual must certify that he or she has no conflict of
21 interest and can evaluate the information used to standardize without favoritism or bias. At least
22 one individual involved in the standardization evaluation must be the spending unit's procurement
23 officer. If the spending unit has no procurement officer, the individual responsible for the spending
24 unit's procurement must participate in the evaluation.

25 (3) The spending unit must advertise the intent to standardize as a request for information
26 in the system used at that time to solicit competitive bids. The spending unit should also identify
27 all known entities that would have an interest in providing a commodity for evaluation and ensure
28 that they receive notice of the request for information. The request for information must be
29 advertised and allow for responses for no less than 30 calendar days. The request for information
30 must notify the vendor community of the following:

31 (A) That the spending unit is attempting to standardize state procurements for the
32 commodity in question;

33 (B) That any entity interested in having its products considered for standardization should
34 provide information on the benefits and drawbacks of that entity's products;

35 (C) Any evaluation criteria that the spending unit will use in the standardization decision;

36 (D) The date and time by which documentation must be provided; and

37 (E) The approximate date and time by which a decision will be made.

38 (4) If the spending unit desires to conduct product testing, it must notify vendors in the
39 request for information and establish a time period during which tests will be performed. Vendors
40 may provide commodities for demonstration, testing, and evaluation so long as such items are
41 provided at no cost and no risk to the state. A written record describing the nature of the testing
42 performed and a written record of the results of that testing shall be produced pursuant to any
43 testing conducted on all the commodities being considered. The written record of testing and
44 results shall be provided to the Purchasing Division and preserved.

45 (5) The spending unit will evaluate the information received in response to the request for
46 information, information the spending unit has obtained from its own research, the results of any
47 product testing, and anything else the spending unit finds relevant to establish a pending
48 standardization.

49 (6) The spending unit must advertise the pending standardization as a request for
50 information in the system used at that time to solicit competitive bids for a minimum of 15 calendar
51 days. The request for information must notify the vendor community and any vendor who has
52 participated in the standardization evaluation process of the following:

53 (A) The pending decision to standardize, including any brand name that has been
54 tentatively selected the standard;

55 (B) The rationale for the selection made in the pending standardization;

56 (C) That comments may be submitted for review for a period of 15 calendar days from the
57 date of the advertisement;

58 (D) The date and time by which a final decision will be made, which will be no less than
59 three days after the comment period has ended; and

60 (E) The location where the final decision will be posted.

61 (7) The spending unit must review the comments submitted in response to the pending
62 standardization advertisement and make any adjustments that it deems necessary.

63 (8) The head of the spending unit shall notify the director of a selection of the standard
64 commodity, and the director shall post the results of the standardization decision on the
65 Purchasing Division's website. The spending unit shall also specifically notify any vendor who
66 participated in the standardization evaluation process of the results in writing, within five business
67 days of the final standardization selection.

68 (e) Any vendor that participated in the standardization process may appeal the
69 standardization decision to the head of the spending unit. The head of the spending unit shall
70 consider the appeal in accordance with the administrative procedures established in chapter 29A
71 of this code.

72 (f) Once a standard has been established, the Purchasing Division is authorized to solicit
73 competitive bids on behalf of the spending unit in the form of a request for quotation for the
74 standardized commodity.

75 (g) The director may develop any necessary forms and reporting templates for use in
76 standardization approval, testing, reporting, or any other forms necessary to carry out the
77 provisions of this section. Such forms and reports shall be maintained by the Purchasing Division.

CHAPTER 5G. PROCUREMENT OF ARCHITECT-ENGINEER

SERVICES BY STATE AND ITS SUBDIVISIONS.

ARTICLE 1. PROCUREMENT OF ARCHITECT-ENGINEER SERVICES.

§5G-1-3. Contracts for architectural and engineering services; selection process where total project costs are estimated to cost \$250,000 or more.

1 In the procurement of architectural and engineering services for projects estimated to cost
2 \$250,000 or more, the director of purchasing shall encourage firms engaged in the lawful practice
3 of the profession to submit an expression of interest, which shall include a statement of
4 qualifications and performance data, and may include anticipated concepts and proposed

5 methods of approach to the project. All jobs shall be announced by public notice published as a
6 Class II legal advertisement in compliance with the provisions of §59-3-1 *et seq.* of this code. A
7 committee of three to five representatives of the agency initiating the request shall evaluate the
8 statements of qualifications and performance data and other material submitted by interested
9 firms and select three firms which, in their opinion, are best qualified to perform the desired
10 service: *Provided*, That if such circumstances exist, such that seeking competition could result in
11 a compromise to public safety, significantly increase costs, or an extended interruption of
12 essential services, the agency may, with the prior approval of the director of purchasing, select a
13 firm on the basis of previous satisfactory performance and knowledge of the agency's facilities
14 and needs: *Provided, however*, That on projects funded, wholly or in part, by School Building
15 Authority moneys, in accordance with §18-9D-15 and §18-9D-16 of this code, two of said three
16 firms shall have had offices within this state for a period of at least one year prior to submitting an
17 expression of interest regarding a project funded by School Building Authority moneys. Interviews
18 with each firm selected shall be conducted and the committee shall conduct discussions regarding
19 anticipated concepts and proposed methods of approach to the assignment. The committee shall
20 then rank, in order of preference, no less than three professional firms deemed to be the most
21 highly qualified to provide the services required, and shall commence scope of service and price
22 negotiations with the highest qualified professional firm for architectural or engineering services
23 or both. Should the agency be unable to negotiate a satisfactory contract with the professional
24 firm considered to be the most qualified, at a fee determined to be fair and reasonable, price
25 negotiations with the firm of second choice shall commence. Failing accord with the second most
26 qualified professional firm, the committee shall undertake price negotiations with the third most
27 qualified professional firm. Should the agency be unable to negotiate a satisfactory contract with
28 any of the selected professional firms, it shall select additional professional firms in order of their
29 competence and qualifications and it shall continue negotiations in accordance with this section
30 until an agreement is reached: *Provided further*, That county boards of education may either elect
31 to start the selection process over in the original order of preference, or it may select additional

32 professional firms in order of their competence and qualifications, and it shall continue
33 negotiations in accordance with this section until an agreement is reached: *And provided further,*
34 That for any water or wastewater construction project the engineering design and construction
35 inspection costs may not exceed the amount calculated pursuant to the compensation curves for
36 consulting engineering services based upon project construction costs published by the American
37 Society of Civil Engineers manual of practice, unless granted a variance by the Infrastructure and
38 Jobs Development Council established pursuant to §31-15A-1 *et seq.* of this code.

**§5G-1-4. Contracts for architectural and engineering services; selection process where
total project costs are estimated to cost less than \$250,000; division of highways
procurements.**

1 (a) In the procurement of architectural and engineering services for projects estimated to
2 cost less than \$250,000, competition shall be sought by the agency. The agency shall conduct
3 discussions with three or more professional firms solicited on the basis of known or submitted
4 qualifications for the assignment prior to the awarding of any contract: *Provided,* That if a judgment
5 is made that special circumstances exist and that seeking competition is not practical, the agency
6 may, with the prior approval of the director of purchasing, select a firm on the basis of previous
7 satisfactory performance and knowledge of the agency's facilities and needs. After selection, the
8 agency and firm shall develop the scope of services required and negotiate a contract.

9 (b) The Division of Highways may procure the services of architectural and engineering firms
10 under the provisions of this section in an amount not to exceed \$750,000 for the services per project.

CHAPTER 6D. PUBLIC CONTRACTS.

ARTICLE 1. DISCLOSURE OF INTERESTED PARTIES.

§6D-1-1. Definitions.

1 For purposes of this article:

2 (a) "Applicable contract" means a contract of a state agency that has an actual or
3 estimated value of at least \$1 million: *Provided,* That this shall include a series of related contracts
4 or orders in which the cumulative total exceeds \$1 million.

5 (b) "Business entity" means any entity recognized by law through which business is
6 conducted, including, but not limited to, a sole proprietorship, partnership, limited liability
7 company, or corporation. For purposes of this article, "business entity" does not include publicly
8 traded companies listed on a national or international stock exchange.

9 (c) "Disclosure" shall mean a form prescribed and approved by the Ethics Commission
10 pursuant to §6D-1-3 of this code.

11 (d) "Interested party" or "interested parties" means: (1) A business entity performing work
12 or service pursuant to, or in furtherance of, the applicable contract, including sub-contractors; (2)
13 any person who has an ownership interest equal to or greater than 25 percent in the business
14 entity performing work or service pursuant to, or in furtherance of, the applicable contract; and (3)
15 the person or business entity, if any, that served as a compensated broker or intermediary to
16 actively facilitate the applicable contract or negotiated the terms of the applicable contract with
17 the state agency: *Provided*, That §6D-1-1(d)(3) of this code shall not include persons or business
18 entities performing legal services related to the negotiation or drafting of the applicable contract.

19 (e) "State agency" means a board, commission, office, department, or other agency in the
20 executive, judicial, or legislative branch of state government, including publicly funded institutions
21 of higher education: *Provided*, That for purposes of this article, the West Virginia Investment
22 Management Board shall not be deemed a state agency nor subject to the requirements of this
23 article.

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 their respective needs:

3 *Provided*, That the governing boards under the jurisdiction of the commission, including the
4 exempted schools, are subject to §18B-5-4(d) of this code.

5 (b) The commission and council jointly shall adopt rules governing and controlling
6 acquisitions and purchases in accordance with this section: *Provided*, That these rules do not
7 apply to the exempted schools and the governing boards of the exempted schools shall adopt
8 their own rules consistent with this section: *Provided, however*, That the joint rules shall provide
9 for appropriate deference to the value judgments of governing boards under the jurisdiction of the
10 commission. The rules shall ensure that the following procedures are followed:

11 (1) No person is precluded from participating and making sales thereof to the council,
12 commission, or governing board except as otherwise provided in §18B-5-5 of this code. Providing
13 consulting services such as strategic planning services does not preclude or inhibit the governing
14 boards, council, or commission from considering a qualified bid or response for delivery of a
15 product or a commodity from the individual providing the services;

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

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

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

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

27 (6) Notices for acquisitions and purchases for which competitive bids are being solicited
28 are posted either in the purchasing office of the specified institution involved in the purchase or

29 by electronic means available to the public at least five days prior to making the purchases. The
30 rules shall ensure that the notice is available to the public during business hours;

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

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

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

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

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

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

43 (3) Within 15 days of receipt, the Attorney General shall notify the appropriate state
44 institution of higher education in writing that the contract, agreement, or other document is
45 approved or disapproved as to form. If the contract, agreement, or other document is disapproved
46 as to form, the notice of disapproval shall identify each defect that supports the disapproval; and

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

50 (d) Pursuant to this subsection, the governing boards under the jurisdiction of the
51 commission, including the exempted schools, respectively, may carry out the following actions:

52 (1) Purchase or acquire all materials, supplies, equipment, services, and printing required
53 for the governing board without approval from the commission or the Vice Chancellor for

54 Administration and may issue checks in advance to cover postage as provided in §18B-5-4(f) of
55 this code;

56 (2) Purchase from cooperative buying groups, consortia, the federal government or from
57 federal government contracts, or from West Virginia public institution of higher education
58 contracts, if the materials, supplies, services, equipment, or printing to be purchased is available
59 from these groups and if this would be the most financially advantageous manner of making the
60 purchase;

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

64 (4) Use purchase cards.

65 (e) The governing boards shall adopt sufficient accounting and auditing procedures and
66 promulgate and adopt appropriate rules subject to §18B-1-6 of this code to govern and control
67 acquisitions, purchases, leases, and other instruments for grounds, buildings, office, or other
68 space, and capital improvements, including equipment, or lease-purchase agreements.

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

72 (g) When a purchase is to be made by bid, any or all bids may be rejected. However, all
73 purchases based on advertised bid requests shall be awarded to the lowest responsible bidder
74 taking into consideration the qualities of the articles to be supplied, their conformity with
75 specifications, their suitability to the requirements of the governing boards, council, or commission
76 and delivery terms.

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 at a state college and
94 university or community and technical college pursuant to this section. These rules shall require
95 that a person may not be employed as a buyer unless that person, at the time of employment,
96 has one of the following qualifications:

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

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

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

105 governing board and the council and commission. In lieu of separate bonds for these buyers, a
106 blanket surety bond may be obtained. The bond shall be filed with the Secretary of State and the
107 cost of the bond shall be paid from funds appropriated to the applicable governing board or the
108 council or commission.

109 (k) All purchases and acquisitions shall be made in consideration and within limits of
110 available appropriations and funds and in accordance with applicable provisions of §5A-2-1 *et*
111 *seq.* of this code relating to expenditure schedules and quarterly allotments of funds.
112 Notwithstanding any other provision of this code to the contrary, only those purchases exceeding
113 the dollar amount for competitive sealed bids in this section are required to be encumbered. Such
114 purchases may be entered into the state's centralized accounting system by the staff of the
115 commission, council, or governing boards to satisfy the requirements of §5A-2-1 *et seq.* of this
116 code to determine whether the amount of the purchase is within the quarterly allotment of the
117 commission, council, or governing board, is in accordance with the approved expenditure
118 schedule and otherwise conforms to the article: *Provided, That*, notwithstanding the foregoing
119 provisions of this subsection or any other provision of this code to the contrary, purchases by
120 exempted schools are not required to be encumbered.

121 (l) The governing boards, council, or commission may make requisitions upon the State
122 Auditor for a sum to be known as an advance allowance account, not to exceed five percent of
123 the total of the appropriations for the governing board, council, or commission, and the State
124 Auditor shall draw a warrant upon the Treasurer for those accounts. All advance allowance
125 accounts shall be accounted for by the applicable governing board or the council or commission
126 once every 30 days or more often if required by the State Auditor.

127 (m) Contracts entered into pursuant to this section shall be signed by the applicable
128 governing board or the council or commission in the name of the state and shall be approved as
129 to form by the Attorney General. A contract which requires approval as to form by the Attorney
130 General is considered approved if the Attorney General has not responded within 15 days of

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

144 (n) If the governing board, council, or commission purchases or contracts for materials,
145 supplies, equipment, services, and printing contrary to §18B-5-4 through §18B-5-7 of this code or
146 the rules pursuant to this article, the purchase or contract is void and of no effect.

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

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

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

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

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

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

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

181 (3) Copies of all appropriate documents relating to any audit performed by a governing
182 board shall be furnished to the Joint Committee on Government and Finance and the Legislative

183 Oversight Commission on Education Accountability within 30 days of the date the audit report is
184 completed.

185 (s) The governing boards shall require each institution under their respective jurisdictions
186 to notify and inform every vendor doing business with that institution of §5A-3-54 of this code,
187 also known as the Prompt Pay Act of 1990.

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

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

193 (1) The council and commission jointly shall establish procedures to be implemented by
194 the council, commission, and any state college and university or community and technical college
195 using purchasing cards. The governing boards of the exempted schools shall establish
196 procedures to be implemented by their respective institutions. The procedures shall ensure that
197 each meets the following conditions:

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

199 (B) Full compliance of §12-3-1 *et seq.* of this code relating to the purchasing card program;

200 and

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

202 (2) Notwithstanding any other provision of this code to the contrary, the council,
203 commission, and any institution authorized pursuant to §18B-5-4(u)(3) of this code may use
204 purchasing cards for the following purposes:

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

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

209 (3) The commission and council each shall evaluate the capacity of each state college
210 and university and community and technical college under its jurisdiction for complying with the
211 procedures established pursuant to §18B-5-4(u)(2) of this code. The commission and council
212 each shall authorize expanded use of purchasing cards pursuant to that subdivision for any state
213 college and university and community and technical college it determines has the capacity to
214 comply.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2018.

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Governor