

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 570

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Introduced February 11, 2019; Referred
to the Committee on Government Organization]

1 A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended; and to
 2 amend and reenact §5A-3-3c of said code, all relating to allowing state spending units to
 3 enter into certain contracts, without bids, resulting from the response, recovery, and relief
 4 for a declared state of emergency.

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.

112 (5) Contracts entered into for construction, demolition or rehabilitation services or any
113 other required contracts related exclusively to response, recovery or relief from a declared state
114 of emergency regardless of the time such declaration is made.

115 (6) Contracts awarded as a result of a grant received by the state spending unit for
116 response, recovery, or relief related to a declared state of emergency in which the grant requires
117 the state spending unit to transfer some or all of the grant to an individual, entity or vendor as a
118 subgrant to accomplish the public purpose, and no contract will directly benefit the state spending
119 unit.

CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.

ARTICLE 3. PURCHASING DIVISION.

§5A-3-3c. Exemptions from purchasing requirements for contracts entered into as part of recovery from a declared state of emergency.

1 (a) The provisions of this article do not apply to contracts entered into during a state of
2 emergency declared by the Governor pursuant to §15-5-6 of this code, so long as the contract is
3 directly and solely related to the recovery from the declared state of emergency.

4 (b) The provisions of this article do not apply to the renewal of a contract entered into
5 during a state of emergency declared pursuant to §15-5-6 of this code, if the contract is directly
6 and solely related to the response, recovery or relief from the declared state of emergency during
7 which the contract was initially entered. For purposes of this subsection, recovery ~~does not~~
8 includes permanent reconstruction after the initial state of emergency has ended.

9 (c) The provisions of this article do not apply to the purchase of goods or services from
10 the federal government, or an agency thereof, if the purchase of those goods and services is
11 directly and solely related to the response, recovery or relief from a state of emergency declared
12 pursuant to §15-5-6 of this code.

13 (d) To qualify for the exemption contained in this section, the Director of the Division of
14 Homeland Security and Emergency Management must certify that the contract or purchase is
15 directly and solely related to the recovery from a declared state of emergency and attach a copy
16 of the proclamation issued by the Governor's office to the certification. Such certifications shall be

17 maintained by the Division of Homeland Security and Emergency Management until the contracts
18 or purchase agreements have been fully executed.

19 (e) For purposes of this section, “directly and solely related” means that the goods or
20 services being purchased or contracted for will be used for response, recovery or relief from the
21 state of emergency only, and will not be used for any other purpose.

NOTE: The purpose of this bill is to allow contracts related to demolition, construction, rehabilitation or other commodities and services related to response, recovery or relief of a declared state of emergency to be entered into without bidding.

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