

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2677

BY DELEGATES STEELE, DISERIO, D. JEFFRIES, LOVEJOY,

MAYNARD, BARRETT, SKAFF, FLUHARTY, AND D. KELLY

[BY REQUEST OF THE DEPARTMENT OF HOMELAND
SECURITY]

[Introduced February 23, 2021; Referred to the
Committee on Veterans' Affairs and Homeland
Security then Finance]

1 A BILL to amend and reenact §15A-3-14 of the Code of West Virginia 1931, as amended, relating
2 to increasing the amount of money for which a purchase may be made without obtaining
3 three bids to \$10,000.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. DIVISION OF CORRECTIONS AND REHABILITATION.

§15A-3-14. Exempt from Purchasing Division; purchasing procedures.

1 (a) The provisions established in §5A-3-1 *et seq.* of this code do not apply to the division
2 or any institution under the control of the division.

3 (b) When the cost under any contract or agreement entered into by the division, other than
4 compensation for personal services, involves an expenditure of more than ~~\$2,500~~ \$10,000 and
5 less than \$25,000, the division shall solicit at least three bids, if possible, from vendors and make
6 a written contract, or agreement, with the lowest responsible bidder. When the cost under any
7 contract or agreement entered into by the division, other than compensation for personal services,
8 involves an expenditure of \$25,000 or more, the division shall make a written contract with the
9 lowest responsive, responsible bidder after public notice is published, which notice shall state the
10 general character of the work and general character of the materials to be furnished, the place
11 where plans and specifications therefor may be examined, and the time and place of receiving
12 bids. The notice may be published by an advertising medium the division ~~deems~~ considers
13 advisable. The division may also solicit sealed bids by sending requests by mail or electronic
14 transmission to prospective vendors. But a contract for lease of a correctional facility is not subject
15 to the foregoing requirements and the division may enter into the contract for lease pursuant to
16 negotiation upon the terms and conditions and for the period as it finds to be reasonable and
17 proper under the circumstances and in the best interests of proper operation or efficient
18 acquisition or construction of the projects. The division may reject any and all bids. A bond with
19 good and sufficient surety, approved by the division, may be required by the division. The good
20 and sufficient surety may be in the form of a bid bond, performance bond, payment bond,

21 maintenance bond, labor and materials bond, or any other type of surety ~~deemed~~ considered
22 necessary by the division.

23 (c) The division may use best value procurement to enter into a contract when the
24 commissioner determines in writing that it is advantageous to the state.

25 (1) A solicitation for bids under best value procurement shall be made in the same manner
26 as provided in this section.

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

36 (3) The award ~~must~~ shall be made to the highest scoring responsive and responsible
37 bidder whose bid is determined, in writing, to be most advantageous to the state, taking into
38 consideration all evaluation factors set forth in the best value solicitation.

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

41 (d)(1) The division may make a direct award of a contract without competitive bidding if:

42 (A) The commissioner shall make a written determination that the direct award is in the
43 best interest of the state;

44 (B) The division documents in writing that competition is not available because there is no
45 other source for the commodity or service, or that no other source would be willing or able to

46 replace the existing source without a detrimental effect on the division, the existence of a
47 detrimental effect being determined by the commissioner in his or her sole discretion;

48 (C) The division publicly advertises a notice of intent to make a direct award without
49 competition in the state's official bid notification system, as well as any other public advertisement
50 that the division ~~deems~~ considers appropriate, for no less than 10 business days; and

51 (D) No other vendor expresses an interest in providing the commodity or service in
52 question.

53 (2) If a vendor expresses an interest in providing the commodity or service described in
54 the notice of intent to make a direct award, then the division ~~must~~ shall convert the direct award
55 to a competitive bid, unless the commissioner determines that the interest expressed by a vendor
56 is unreasonable. The competitive bid may, ~~at the discretion of the commissioner,~~ be either a
57 request for quotation or request for proposal.

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

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

60 (B) A time period by which delivery ~~must~~ shall be made or performance ~~must~~ shall occur;

61 (C) The price that will be paid for the commodity or service;

62 (D) Any limitations that a competing vendor would need to satisfy;

63 (E) An invitation to all vendors interested in providing the commodity or service to make
64 that interest known; and

65 (F) Contact information for the commissioner or his or her designee, and instructions to
66 submit a statement of interest to the commissioner or his or her designee.

67 (e) The commissioner, or division, ~~shall~~ may not award a contract or renew a contract to
68 any vendor or prospective vendor when the vendor or prospective vendor, or a related party to
69 the vendor or prospective vendor, is a debtor and:

70 (1) The debt owed is an amount greater than \$1,000 in the aggregate; or

71 (2) The debtor is in employer default.

72 (f) The division ~~has the authority to~~ may run criminal background checks, financial
73 background checks, a licensing check, and a credit check, and any vendor, or any and all
74 principals in a company or corporation, ~~must~~ shall submit to said checks to be eligible to be
75 awarded a contract for the division. The commissioner, or division, shall not award a contract to
76 a vendor if any of the following are present:

77 (1) Conviction of an offense involving fraud or a felony offense in connection with obtaining
78 or attempting to obtain a public contract or subcontract;

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

80 (3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification,
81 or destruction of records, making false statements, or receiving stolen property in connection with
82 the performance of a contract;

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

85 (5) Default on obligations owed to the State, including, but not limited to, obligations owed
86 to the Workers' Compensation Fund, as defined in §23-2C-1 *et seq.* of this code, and obligations
87 under the West Virginia Unemployment Compensation Act and West Virginia state tax and
88 revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the
89 vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into
90 a repayment agreement with the appropriate agency of the State or has entered into a repayment
91 agreement but does not remain in compliance with its obligations under the repayment
92 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a
93 vendor granted an exemption under any rule of Workforce West Virginia, formerly known as the
94 Bureau of Employment Programs or the Insurance Commission, the commissioner may award a
95 contract: *Provided*, That in no event may the contract be awarded to any vendor who has not paid
96 all current state obligations for at least the four most recent calendar quarters, excluding the

97 current calendar quarter, or with respect to any vendor who is in default on a repayment
98 agreement with an agency of the state;

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

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

106 (8) Violation of the terms of public contracts or subcontracts for:

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

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

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

116 (D) A repeated pattern or practice of failure to perform so serious and compelling as to
117 justify disqualification; or

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

121 (g) Unless the context clearly requires a different meaning, for the purposes of this section,
122 the term:

123 (1) "Debt" means any assessment, premium, penalty, fine, tax, or other amount of money
124 owed to the state or any of its political subdivisions because of a judgment, fine, permit violation,
125 license assessment, amounts owed to the Workers' Compensation Fund as defined in §23-2C-1
126 *et seq.* of this code, penalty, or other assessment or surcharge presently delinquent or due and
127 required to be paid to the state or any of its political subdivisions, including any interest or
128 additional penalties accrued thereon;

129 (2) "Debtor" means any individual, corporation, partnership, association, limited liability
130 company, or any other form of business association owing a debt to the State or any of its political
131 subdivisions, and includes any person or entity that is in employer default;

132 (3) "Employer default" means having an outstanding balance or liability to the Old Fund or
133 to the Uninsured Employers' Fund or being in policy default, as defined in §23-2C-2 of this code,
134 failure to maintain mandatory workers' compensation coverage, or failure to fully meet its
135 obligations as a workers' compensation self-insured employer. An employer is not in employer
136 default if it has entered into a repayment agreement with the Insurance Commissioner and
137 remains in compliance with the obligations under the repayment agreement;

138 (4) "Political subdivision" means any county commission; municipality; county board of
139 education; any instrumentality established by a county or municipality; any separate corporation
140 or instrumentality established by one or more counties or municipalities, as permitted by law; or
141 any public body charged by law with the performance of a government function and whose
142 jurisdiction is coextensive with one or more counties or municipalities; and

143 (5) "Related party" means a party, whether an individual, corporation, partnership,
144 association, limited liability company, or any other form of business association or other entity
145 whatever, related to any vendor by blood, marriage, ownership, or contract through which the
146 party has a relationship of ownership or other interest with the vendor so that the party will actually,
147 or by effect, receive or control a portion of the benefit, profit, or other consideration from

148 performance of a vendor contract with the party receiving an amount that meets or exceeds five
149 percent of the total contract amount.

150 (h) The prohibitions of subdivision (5), subsection (f) of this section do not apply where a
151 vendor has contested any tax administered pursuant to chapter 11 of this code, amount owed to
152 the Workers' Compensation Fund as defined in §23-2C-1 *et seq.* of this code, permit fee, or
153 environmental fee or assessment and the matter has not become final, or where the vendor has
154 entered into a payment plan or agreement and the vendor is not in default of any of the provisions
155 of such plan or agreement.

156 (i) The division may disqualify a vendor if award to the vendor would jeopardize the safe,
157 secure, and orderly operations of the division.

158 (j) All bids, contract proposals, or contracts with the State or any of its political subdivisions
159 submitted or approved under the provisions of this code shall include an affidavit that the vendor,
160 prospective vendor, or a related party to the vendor or prospective vendor is not in employer
161 default and does not owe any debt in an amount in excess of \$1,000 or, if a debt is owed, that the
162 provisions of subsection (h) of this section apply.

163 (k) If the division has to make a purchase under emergency conditions, or an emergency
164 situation, that jeopardizes the safe, secure, and orderly operations of the division, as ~~deemed~~
165 determined by the commissioner, and approved by the secretary of the Department of Military
166 Affairs and Public Safety, subsection (b) of this section shall not apply.

167 (l) The commissioner may enter into agreements with medical schools and institutions of
168 higher education in this state to develop standards for appropriate and innovative medical
169 programming and care for inmates: *Provided*, That the division ~~will~~ shall follow the procedures set
170 forth in subsection (b) of this section for delivery of regular and normal medical care within the
171 facilities.

172 (m) Notwithstanding any other provision of this code to the contrary, any records obtained
173 in response to solicitations for bids from the division ~~shall~~ may not be subject to disclosure

174 pursuant to §29B-1-1 *et seq.* of this code, ~~must~~ shall until and unless the time frame for
175 submission of bids has closed: *Provided*, That once bids close, the records may be exempt from
176 disclosure pursuant to §29B-1-4 of this code. Any record relating to any solicitation for, or
177 purchase of, any item related to the safe and secure running of any facility under the jurisdiction
178 of the commissioner of the Division of Corrections and Rehabilitation is not subject to disclosure
179 pursuant to §29B-1-1 *et seq.* of this code.

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NOTE: The purpose of this bill is to increase the threshold for bid requirement to \$10,000 to be consistent with other agencies of the state.

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