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2004 APR -7 P 2: 23

OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2004



ENROLLED

House Bill No. 3150

(By Delegates Calvert and Amores)



Passed March 13, 2004

In Effect Ninety Days from Passage

FILED

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SECRETARY OF STATE

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H. B. 3150

(BY DELEGATES CALVERT AND AMORES)

[Passed March 13, 2004; in effect ninety days from passage.]

AN ACT to amend and reenact §5-22-1 of the code of West Virginia, 1931, as amended; to amend and reenact §5-22A-10 of said code; to amend and reenact §7-11B-14 of said code; and to amend and reenact §38-2-39 of said code, all relating to establishing the West Virginia fairness in competitive bidding act; definitions; establishing procedures and requirements for awarding contracts for government construction projects; requirements for performance, payment, bid and surety bonds; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That §5-22-1 of the code of West Virginia, 1931, as amended, be amended and reenacted; that §5-22A-10 of said code be amended and reenacted; that §7-11B-14 of said code be amended and reenacted; and that §38-2-39 of said code be amended and reenacted, all to read as follows:

**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 set forth in this
2 section may be referred to as the “West Virginia Fairness In
3 Competitive Bidding Act”.

4 (b) As used in this section:

5 (1) “Lowest qualified responsible bidder” means the bidder
6 that bids the lowest price and that meets, as a minimum, all the
7 following requirements in connection with the bidder’s re-
8 sponse to the bid solicitation. The bidder must certify that it:

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

11 (B) Is in compliance with all applicable laws of the state of
12 West Virginia; and

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

15 (2) “The state and its subdivisions” means the state of West
16 Virginia, every political subdivision thereof, every administra-
17 tive entity that includes such a subdivision, all municipalities
18 and all county boards of education.

19 (c) The state and its subdivisions shall, except as provided
20 in this section, solicit competitive bids for every construction
21 project exceeding twenty-five thousand dollars in total cost:

22 *Provided*, That a vendor who has been debarred pursuant to the
23 provisions of sections thirty-three-a through thirty-three-f,
24 inclusive, article three, chapter five-a of this code may not bid
25 on or be awarded a contract under this section. All bids submit-
26 ted pursuant to this chapter shall include a valid bid bond or
27 other surety as approved by the state of West Virginia or its
28 subdivisions.

29 (d) Following the solicitation of bids, the construction
30 contract shall be awarded to the lowest qualified responsible
31 bidder who shall furnish a sufficient performance and payment
32 bond: *Provided*, That the state and its subdivisions may reject
33 all bids and solicit new bids on the project.

34 (e) The contracting public entity may not award the contract
35 to a bidder which fails to meet the minimum requirements set
36 out in this section. As to any prospective low bidder which the
37 contracting public entity determines not to have met any one or
38 more of the requirements of this section or other requirements
39 as determined by the public entity in the written bid solicitation,
40 prior to the time a contract award is made, the contracting
41 public entity shall document in writing and in reasonable detail
42 the basis for the determination and shall place the writing in the
43 bid file. After the award of a bid under this section, the bid file
44 of the contracting public agency and all bids submitted in
45 response to the bid solicitation shall be open and available for
46 public inspection.

47 (f) Any public official or other person who individually or
48 together with others knowingly makes an award of a contract
49 under this section in violation of the procedures and require-
50 ments of this section is subject to the penalties set forth in
51 section twenty-nine, article three, chapter five-a of the code of
52 West Virginia.

53 (g) No officer or employee of this state or of any public
54 agency, public authority, public corporation or other public
55 entity and no person acting or purporting to act on behalf of

56 such officer or employee or public entity shall require that any
57 performance bond, payment bond or surety bond required or
58 permitted by this section be obtained from any particular surety
59 company, agent, broker or producer.

60 (h) All bids shall be open in accordance with the provisions
61 of section two of this article, except design-build projects which
62 are governed by article twenty-two-a of this chapter and are
63 exempt from these provisions.

64 (i) Nothing in this section shall apply to:

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

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

70 (3) Emergency repairs to building components and systems.
71 For the purpose of this subdivision, the term emergency repairs
72 means repairs that if not made immediately will seriously
73 impair the use of building components and systems or cause
74 danger to those persons using the building components and
75 systems; and

76 (4) Any situation where the state or a subdivision thereof
77 reaches an agreement with volunteers, or a volunteer group,
78 whereby the governmental body will provide construction or
79 repair materials, architectural, engineering, technical or any
80 other professional services and the volunteers will provide the
81 necessary labor without charge to, or liability upon, the
82 governmental body.

ARTICLE 22A. DESIGN-BUILD PROCUREMENT ACT.

§5-22A-10. Solicitation of proposals.

1 Proposals must be solicited from not less than three
2 design-builders. A request for proposal must be prepared for
3 each design-build contract and shall consist of, but not be
4 limited to:

5 (1) The identity of the agency which will award the
6 design-build contract;

7 (2) The procedures to be followed for submitting proposals,
8 the criteria for evaluation of proposals and their relative weight,
9 and the procedures for making awards, including a reference to
10 the requirements of this article, the rules promulgated herein
11 and any regulations pertaining to the agency;

12 (3) The proposed terms and conditions for the design-build
13 contract;

14 (4) The performance criteria;

15 (5) The description of the drawings, specifications or other
16 submittals to be submitted with the proposal, with guidance as
17 to the form and level of completeness of the drawings, specifi-
18 cations or submittals that will be acceptable;

19 (6) A schedule for planned commencement and completion
20 of the design-build contract;

21 (7) Budget limits for the design-build contract, if any;

22 (8) Design-builder qualifications; and

23 (9) Requirements for performance bonds, payment bonds
24 and insurance: *Provided*, That no officer or employee of this
25 state or of any public agency, public authority, public corpora-
26 tion, or other public entity, and no person acting or purporting
27 to act on behalf of such officer or employee or public entity
28 shall require that any performance bond, payment bond, or bid

29 bond required or permitted by this section be obtained from any
30 particular surety company, agent, broker or producer.

31 The request for proposals may include any other informa-
32 tion that the agency, at its discretion, chooses to supply,
33 including, but not limited to, surveys, soils reports, drawings or
34 models of existing structures, environmental studies, photo-
35 graphs or references to public records.

36 Notice of requests for proposals must be advertised as
37 prescribed by the procedures utilized by the purchasing division
38 pursuant to article three, chapter five-a of this code.

CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.

ARTICLE 11B. WEST VIRGINIA TAX INCREMENT FINANCING ACT.

**§7-11B-14. Projects financed by tax increment financing consid-
ered to be public improvements subject to prevail-
ing wage, local labor preference and competitive
bid requirements.**

1 (a) Any project acquired, constructed, or financed, in whole
2 or in part, by a county commission or municipality under this
3 article shall be considered to be a “public improvement” within
4 the meaning of the provisions of articles one-c and five-a,
5 chapter twenty-one of this code.

6 (b) The county commission or municipality shall, except as
7 provided in subsection (c) of this section, solicit or require
8 solicitation of competitive bids and require the payment of
9 prevailing wage rates as provided in article five-a, chapter
10 twenty-one of this code and compliance with article one-c of
11 said chapter for every project or infrastructure project funded
12 pursuant to this article exceeding twenty-five thousand dollars
13 in total cost.

14 (c) Following the solicitation of the bids, the construction
15 contract shall be awarded to the lowest qualified responsible
16 bidder, who shall furnish a sufficient performance and payment
17 bond: *Provided*, That the county commission, municipality or
18 other person soliciting the bids may reject all bids and solicit
19 new bids on the project.

20 (d) No officer or employee of this state or of any public
21 agency, public authority, public corporation, or other public
22 entity, and no person acting or purporting to act on behalf of
23 such officer or employee or public entity shall require that any
24 performance bond, payment bond, or bid bond required or
25 permitted by this section be obtained from any particular surety
26 company, agent, broker or producer.

27 (e) This section does not:

28 (1) Apply to work performed on construction projects not
29 exceeding a total cost of fifty thousand dollars by regular
30 full-time employees of the county commission or the municipi-
31 tality: *Provided*, That no more than fifty thousand dollars shall
32 be expended on an individual project in a single location in a
33 twelve-month period;

34 (2) Prevent students enrolled in vocational educational
35 schools from being used in construction or repair projects when
36 such use is a part of the students' training program;

37 (3) Apply to emergency repairs to building components and
38 systems: *Provided*, That the term "emergency repairs" means
39 repairs that, if not made immediately, will seriously impair the
40 use of the building components and systems or cause danger to
41 those persons using the building components and systems; or

42 (4) Apply to any situation where the county commission or
43 municipality comes to an agreement with volunteers, or a
44 volunteer group, by which the governmental body will provide

45 construction or repair materials, architectural, engineering,
46 technical or any other professional services and the volunteers
47 will provide the necessary labor without charge to, or liability
48 upon, the governmental body: *Provided*, That the total cost of
49 the construction or repair projects does not exceed fifty
50 thousand dollars.

51 (f) The provisions of subsection (b) of this section apply to
52 privately owned projects or infrastructure projects constructed
53 on lands not owned by the county commission, a municipality
54 or a government agency or instrumentality when the owner or
55 the owner's agent or person financing the owner's project
56 receives money from the tax increment financing fund for the
57 owner's project.

CHAPTER 38. LIENS.

ARTICLE 2. MECHANICS' LIENS.

§38-2-39. Public building; bond of contractor; recordation of bond; no lien in such case.

1 It shall be the duty of the state commissioner of public
2 institutions, and of all county courts, boards of education,
3 boards of trustees, and other legal bodies having authority to
4 contract for the erection, construction, improvement, alteration
5 or repair of any public building or other structure, or any
6 building or other structure used or to be used for public
7 purposes, to require of every person to whom it shall award, and
8 with whom it shall enter into, any contract for the erection,
9 construction, improvement, alteration or repair of any such
10 public building or other structure used or to be used for public
11 purposes, that such contractor shall cause to be executed and
12 delivered to the secretary of such commissioner or other legal
13 body, or other proper and designated custodian of the papers
14 and records thereof, a good, valid, solvent and sufficient bond,
15 in a penal sum equal at the least to the reasonable cost of the

16 materials, machinery, equipment and labor required for the
17 completion of such contract, and conditioned that in the event
18 such contractor shall fail to pay in full for all such materials,
19 machinery, equipment and labor delivered to him for use in the
20 erection, construction, improvement, alteration or repair of such
21 public building or other structure, or building or other structure
22 used or to be used for public purposes, then such bond and the
23 sureties thereon shall be responsible to such materialman,
24 furnisher of machinery or equipment, and furnisher or per-
25 former of such labor, or their assigns, for the full payment of
26 the full value thereof.

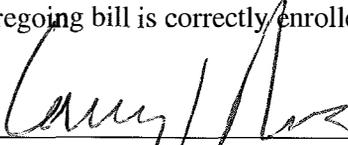
27 No officer or employee of this state or of any public
28 agency, public authority, public corporation, or other public
29 entity, and no person acting or purporting to act on behalf of
30 such officer or employee or public entity shall require that any
31 surety bond required or permitted by this section be obtained
32 from any particular surety company, agent, broker or producer.

33 All such bonds shall have as surety thereon either some
34 incorporated bonding and/or surety company authorized to
35 carry on business in this state, or in lieu of such corporate
36 surety the contractor may deposit as security for such bond with
37 the said state commissioner of public institutions, county court,
38 board of education, board of trustees or other legal body having
39 authority so to contract, a sum in cash or bonds and securities
40 of the United States of America or of the state of West Virginia
41 of sufficient amount and value equal at least to the reasonable
42 cost of materials, machinery, equipment and labor required for
43 the completion of such contract. Immediately upon the accep-
44 tance of either of said bonds by the state commissioner of
45 public institutions, county court, board of education and board
46 of trustees, or other legal body, the bond shall be recorded by
47 the secretary of such commissioner or other legal body, or by
48 the proper designated custodian of the papers or records thereof,
49 in the office of the clerk of the county court of the county or

50 counties wherein such work is to be done and where such
51 materials, machinery or equipment are to be delivered, and no
52 such contract shall be binding and effective upon either party or
53 parties thereto until such bond has been executed, delivered and
54 recorded as aforesaid.

55 Nothing in this article shall be construed to give a lien upon
56 such a public building or improvement as is mentioned in this
57 section, or upon the land upon which such public building or
58 improvement is situated.

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

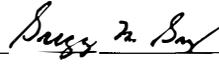

Chairman Senate Committee


Chairman House Committee

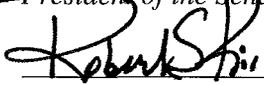
Originating in the House.

In effect ninety days from passage.


Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 7th
day of April, 2004.


Governor

PRESENTED TO THE
GOVERNOR

DATE 4-1-04
TIME 4:35 pm