

# **WEST VIRGINIA LEGISLATURE**

## **2018 REGULAR SESSION**

**Introduced**

### **Senate Bill 259**

BY SENATORS JEFFRIES, STOLLINGS, GAUNCH, ROMANO,

AND SWOPE

[Introduced January 12, 2018; Referred  
to the Committee on Government Organization; and then  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended, relating  
 2 to clarifying the process for assessing the lowest qualified responsible bidder in  
 3 government construction contracts; amending definitions; requiring the total budget for the  
 4 project to be listed in the solicitation; requiring the state or its subdivisions to list any  
 5 alternates in their order of preference and evaluate bids based on that order; detailing how  
 6 the base bid and the alternates shall be evaluated in order to determine a neutral low  
 7 bidder; eliminating the ability of the state or its subdivisions to select alternates out of order  
 8 to reach a favored bidder; and reorganizing certain requirements in current code for clarity  
 9 purposes.

*Be it enacted by the Legislature of West Virginia:*

**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 as  
 5 detailed in this section, and that meets, as a minimum, all the following requirements in connection  
 6 with the bidder's response 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 (c) The state and its subdivisions shall, except as provided in this section, solicit  
22 competitive bids for every construction project exceeding \$25,000 in total cost. The solicitation  
23 shall include the total budget for the project, so that a bidder may obtain a sufficient bid bond or  
24 other surety. If the solicitation contains a request for any alternates, the alternates shall be listed  
25 numerically in the order of preference in the solicitation, such that if funds are available in the  
26 project, based on bids received, the state and its subdivisions shall include the alternates as part  
27 of the lowest bid analysis in the order in which they are listed. A vendor who has been debarred  
28 pursuant to §5A-3-33b through §5A-3-33f, inclusive, of this code may not bid on or be awarded a  
29 contract under this section. All bids submitted pursuant to this chapter shall include a valid bid  
30 bond or other surety as approved by the State of West Virginia or its subdivisions.

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

34 (e) (d) Any solicitation of bids shall include no more than ~~seven~~ five alternates. ~~Alternates,~~  
35 ~~if accepted, shall be accepted in the order in which they are listed on the bid form: *Provided*, That~~  
36 ~~a public entity may accept an alternate out of the listed order if acceptance would not affect~~  
37 ~~determination of the lowest qualified responsible bidder~~ Following the solicitation of bids, the

38 construction contract shall be awarded to the lowest qualified responsible bidder who shall furnish  
39 a sufficient performance and payment bond. If a solicitation contains a request for alternates,  
40 determination of the lowest qualified responsible bidder shall be based on the sum of the base  
41 bid plus each alternate in order, such that the lowest qualified responsible bidder is the bidder  
42 whose bid includes the most alternates, in order of preference, for the lowest bid that remains  
43 within the total budget for the project as contained in the solicitation. Any unaccepted alternate  
44 contained within a bid shall expire ~~one hundred fifty~~ ninety days after the date of the opening of  
45 bids for review.

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

48 (e) The state and its subdivisions may reject all bids and solicit new bids on the project.

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

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

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

67 (2) The state spending unit refuses to approve a subcontractor in the original bid because  
68 the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under  
69 §5A-3-32 of this code; or

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

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

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

88 (j) A public official or other person who individually or together with others knowingly  
89 makes an award of a contract under this section in violation of the procedures and requirements

90 of this section is subject to the penalties set forth in §29-3-5a of the Code of West Virginia.

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

96 (l) All bids shall be open in accordance with the provisions of section two of this article,  
97 except design-build projects which are governed by article twenty-two-a of this chapter and are  
98 exempt from these provisions.

99 (m) Nothing in this section applies to:

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

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

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

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

NOTE: The purpose of this bill is to end the possibility of bid manipulation in order to ensure

the lowest qualified bidder receives the project by, in part, requiring the soliciting state agency or subdivision to include alternates in its order of preference.

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