

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

House Bill 209

BY DELEGATES HANSHAW (MR. SPEAKER) AND MILEY

BY REQUEST OF THE EXECUTIVE

[Introduced July 22, 2019; Referred

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 requirements for competitive bidding on government construction contracts; providing
3 that the term “construction project” includes certain work performed for recovery from a
4 declared state of emergency declared prior to July 1, 2019; providing that such certain
5 work for residential structures may be procured through competitive bidding on an open-
6 ended basis as to quantity; providing a sunset date of March 1, 2020 for this provision;
7 providing a limitation in value of \$5,000,000 for each such contract; and updating a
8 reference to other sections of code.

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 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) (A) "Construction project" means a specifically identified scope of work involving the
22 act, trade, or process of building, erecting, constructing, adding, repairing, remodeling,
23 rehabilitating, reconstructing, altering, converting, improving, expanding, or demolishing of a
24 building, structure, facility, road, or highway. Repair and maintenance of existing public
25 improvements that are recurring or ongoing in nature and that are not fully identified or known at
26 any one time shall be considered a construction project and procured according to this article on
27 an open-ended basis, so long as the work to be performed under the contract falls into a generally
28 accepted single class, or type, and bidders are notified of the open-ended nature of the work in
29 the solicitation: *Provided*, That no open-ended repair or maintenance contract may exceed
30 \$500,000.

31 (B) For work performed as part of disaster mitigation or recovery originating from a state
32 of emergency declared pursuant to the provisions of §15-5-6 of this code, and which was declared
33 prior to July 1, 2019, the scope of which may not be fully identified or known at the time of letting
34 a solicitation for bid, and involving the act, trade, or process of building, erecting, constructing,
35 adding, repairing, remodeling, rehabilitating, reconstructing, altering, converting, improving,
36 expanding, or demolishing of a residential structure as defined in §21-11-3(p) of this code, shall
37 also be considered a construction project, and, may be procured according to the provisions of

38 this article by the State of West Virginia on an open-ended basis as to quantity, so long as the
39 open-ended nature of the contract is disclosed in the solicitation, and the type of work to be
40 completed is generally known and identified in the solicitation in a way that allows for fair and
41 competitive bidding under this article: *Provided*, that this paragraph shall expire on March 1, 2020
42 if not extended by action of the Legislature, and: *Provided further*, that no open-ended contract
43 may exceed \$5,000,000 in value, including change orders.

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

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

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

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

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

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

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

61 (g) The apparent low bidder on a contract valued at more than \$250,000 for the
62 construction, alteration, decoration, painting, or improvement of a new or existing building or
63 structure with a state spending unit shall submit a list of all subcontractors who will perform more

64 than \$25,000 worth of work on the project including labor and materials. This section does not
65 apply to other construction projects such as highway, mine reclamation, water, or sewer projects.
66 The list shall include the names of the bidders and the license numbers as required by §21-11-1
67 *et seq.* of this code. This information shall be provided to the state spending unit within one
68 business day of the opening of bids for review prior to the awarding of a construction contract. If
69 the apparent low bidder fails to submit the subcontractor list, the spending unit shall promptly
70 request by telephone and electronic mail that the low bidder and second low bidder provide the
71 subcontractor list within one business day of the request. Failure to submit the subcontractor list
72 within one business day of receiving the request shall result in disqualification of the bid. A
73 subcontractor list may not be required if the bidder provides notice in the bid submission or in
74 response to a request for a subcontractor list that no subcontractors who will perform more than
75 \$25,000 worth of work will be used to complete the project.

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

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

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

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

84 (i) The contracting public entity may not award the contract to a bidder which fails to meet
85 the minimum requirements set out in this section. As to a prospective low bidder which the
86 contracting public entity determines not to have met one or more of the requirements of this
87 section or other requirements as determined by the public entity in the written bid solicitation, prior
88 to the time a contract award is made, the contracting public entity shall document in writing and
89 in reasonable detail the basis for the determination and shall place the writing in the bid file. After

90 the award of a bid under this section, the bid file of the contracting public agency and all bids
91 submitted in response to the bid solicitation shall be open and available for public inspection.

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

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

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

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

111 (n) Nothing in this section applies to:

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

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

116 (3) Emergency repairs to building components, systems, and public infrastructure. For the
117 purpose of this subdivision, the term “emergency repairs” means repairs that if not made
118 immediately will seriously impair the use of building components, systems, and public
119 infrastructure or cause danger to persons using the building components, systems, and public
120 infrastructure; and

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

NOTE: The purpose of this bill is provide that work performed for recovery from a declared state of disaster or state of emergency is to be considered as a government construction project subject to competitive 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.