

WEST VIRGINIA LEGISLATURE
2019 FIRST EXTRAORDINARY SESSION

Introduced

Senate Bill 1010

**FISCAL
NOTE**

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Introduced May 20, 2019]

1 A BILL to repeal §5A-3-28, §5A-3-30, and §5A-3-31 of the Code of West Virginia, 1931, as
 2 amended; and to amend said code by adding thereto a new article, designated §61-5B-1,
 3 §61-5B-2, and §61-5B-3, all relating generally to state purchasing; moving and modifying
 4 certain criminal provisions relating to government procurement from chapter 5A to chapter
 5 61 of this code; defining terms; prohibiting persons purchasing commodities and services
 6 on behalf of a governmental entity from having an interest in entities selling or contracting
 7 to sell commodities or services to a governmental entity; prohibiting persons purchasing
 8 commodities or services on behalf of a governmental entity from accepting anything of
 9 value from persons selling, attempting to sell, or contracting to sell commodities or
 10 services to a governmental entity; prohibiting persons or entities attempting to sell or
 11 selling commodities to a governmental entity from offering anything of value to the person
 12 acting as a governmental entity’s agent; prohibiting delivery and acceptance of inferior
 13 commodities or services; authorizing change orders made in good faith from prohibited
 14 conduct; creating exceptions to prohibited conduct consistent with state ethics law; and
 15 establishing criminal penalties.

Be it enacted by the Legislature of West Virginia:

CHAPTER 5A. DEPARTMENT OF ADMINISTRATION.

ARTICLE 3. PURCHASING DIVISION.

**§5A-3-28. Financial interest of secretary, etc.; receiving reward from interested party;
penalty; application of bribery statute.**

1 [Repealed.]

**§5A-3-30. Statement of purpose; obtaining money and property under false pretenses or
by fraud from the state; penalties; definition.**

1 [Repealed.]

§5A-3-31. Corrupt actions, combinations, collusions or conspiracies prohibited; penalties.

1 [Repealed.]

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 5B. PROHIBITED ACTS IN GOVERNMENT PROCUREMENT.

§61-5B-1 Definitions.

1 As used in this article, the terms listed in this section have the meaning assigned to them
2 below.

3 “Anything of value” or “thing of value” means and includes: (1) Money, bank bills, or notes,
4 United States Treasury notes and other bills, bonds or notes issued by lawful authority and
5 intended to pass and circulate as money; (2) goods and chattels; (3) promissory notes, bills of
6 exchange, orders, drafts, warrants, checks, bonds given for the payment of money, or the
7 forbearance of money due or owing; (4) receipts given for the payment of money or other property;
8 (5) any right or choice in action; (6) chattels real or personal or things which savor of realty and
9 are, at the time taken, a part of a freehold, whether they are of the substance or produce thereof
10 or affixed thereto, although there may be no interval between the severing and the taking away
11 thereof; (7) any interest in realty, including, but not limited to, fee simple estates, life estates,
12 estates for a term or period of time, joint tenancies, cotenancies, tenancies in common, partial
13 interests, present or future interests, contingent or vested interests, beneficial interests, leasehold
14 interests, or any other interest or interests in realty of whatsoever nature; (8) any promise of
15 employment, present or future; (9) donation or gift; (10) rendering of services or the payment
16 thereof; (11) any advance or pledge; (12) a promise of present or future interest in any business
17 or contract or other agreement; or (13) every other thing or item, whether tangible or intangible,
18 having economic worth.

19 “Business entity” means any individual, legal person, firm, partnership, association, or
20 similar organization with the capacity to contract under West Virginia law;

21 “Commodities” means supplies, material, equipment, and any other articles or things used

22 by, or furnished to, a governmental entity, including the use, extension, loan or grant of money,
23 credit, or waivers of debt or liability;

24 “Governmental entity” means any department, agency, commission, institution, board, or
25 similar entity within any branch of government of the State of West Virginia;

26 “Inferior commodities or services” means:

27 (1) Any commodity or service that materially fails to meet the specification or standard
28 issued by the governmental entity;

29 (2) Any commodity or service that does not meet a specification or standard required by
30 state or federal law; or (3) any commodity or service which is of a materially lesser quality,
31 quantity, or measure of any kind set forth within the specification or standard issued by the
32 procuring governmental entity.

33 “Services” means the furnishing of labor, time, expertise, or effort, not involving the
34 delivery of a specific end commodity or product other than one that may be incidental to the
35 required performance.

§61-5B-2. Financial Interests of state purchasing agents; prohibitions; offenses; penalties.

1 (a) Except as authorized by the provisions of §6B-1-1 et seq. of this code:

2 (1) No person purchasing or contracting for the purchase of commodities or services on
3 behalf of a governmental entity may have any interest, direct or indirect, in any business entity
4 bidding, contracting with, or selling commodities or services to the governmental entity for which
5 the person is acting as an agent.

6 (2) No person purchasing or contracting for the purchase of commodities or services on
7 behalf of a governmental entity may accept anything of value from a business entity offering to
8 sell, providing, or contracting to sell or provide commodities or services to the governmental entity
9 for which the person is acting as an agent.

10 (3) No business entity selling, offering to sell, or bidding on a contract to provide
11 commodities or services to a governmental entity may offer to any person acting as an agent for

12 a governmental entity in said purchase or contract anything of value without receiving fair value
13 therefor.

14 (b) Any person or entity violating the provisions of subsection (a)(1) of this section is guilty
15 of a misdemeanor and, upon conviction thereof, shall be fined not less than \$50 nor more than
16 \$500 or confined in jail for not more than one year, or both fined and confined.

17 (c) Any person or entity violating the provisions of subsection (a)(2) or (a)(3) of this section
18 by accepting anything of value with a fair market value of greater than \$25 is guilty of a
19 misdemeanor and, upon conviction thereof, shall be fined not less than \$50 nor more than \$500
20 or confined in jail for not more than one year, or both fined and confined.

§61-5B-3. Obtaining money and property under false pretenses or by fraud from the state;
penalties; definition; application of change orders.

1 (a) It is unlawful for any business entity to obtain any money or other thing of value from
2 a governmental entity by known delivery of inferior commodities or services to a governmental
3 entity, with the intent to defraud the governmental entity.

4 (b) It is unlawful for any person to knowingly accept delivery of inferior commodities or
5 services on behalf of a governmental entity with intent to defraud that governmental entity.

6 (c) Any person who violates the provisions of this section is guilty of a felony and, upon
7 conviction thereof, shall be fined not more than \$10,000 or imprisoned in a state correctional
8 facility for not less than one year nor more than five years, or both fined and imprisoned.

9 (d) It shall not be a defense to a charge under this section that: (1) The commodities or
10 services were accepted and used, or are being used, by the relevant governmental entity; or (2)
11 the commodities or services are functional or suitable for the purpose for which the commodities
12 or services were purchased by the governmental entity notwithstanding a deviation from the
13 standard or specification issued by the governmental entity that makes the commodities inferior.

14 (e) Nothing in this section prohibits the negotiation, issuance, or approval of a change
15 order to modify the initial specification or standard issued, provided that the intent of the

- 16 modification is to serve the best interests of the governmental entity and not to defraud the
17 governmental entity, circumvent competitive bidding requirements, or provide a beneficial
18 personal interest to a procurement authority.

NOTE: The purpose of this bill is to prohibit persons purchasing commodities and services on behalf of a governmental entity from having an interest in entities selling or contracting to sell commodities or services to a governmental entity; prohibit persons purchasing commodities or services on behalf of a governmental entity from accepting anything of value from persons selling, attempting to sell, or contracting to sell commodities or services to a governmental entity; prohibit persons or entities attempting to sell or selling commodities to a governmental entity from offering anything of value to the person acting as a governmental entity's agent; prohibit delivery and acceptance of inferior commodities or services, authorizing change orders made in good faith from prohibited conduct; create exceptions to prohibited conduct consistent with state ethics law; and establish criminal penalties

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