

WEST VIRGINIA LEGISLATURE
2019 FIRST EXTRAORDINARY SESSION

Introduced

Senate Bill 1044

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Introduced June 24, 2019; referred to the Committee on
Government Organization]

1 A BILL to amend and reenact §5-22-1 of the Code of West Virginia, 1931, as amended, relating
 2 to permitting work performed as part of disaster mitigation or recovery originating from a
 3 declared state of preparedness or state of emergency be contracted out on an open-ended
 4 basis; specifying certain conditions for fair and competitive bidding; and providing
 5 examples of a construction project.

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) "Construction project" means a specifically identified scope of work involving the act,
22 trade, or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating,
23 reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure,
24 facility, road, or highway. Repair and maintenance of existing public improvements that are
25 recurring or ongoing in nature and that are not fully identified or known at any one time shall be
26 considered a construction project and procured according to this article on an open-ended basis,
27 so long as the work to be performed under the contract falls into a generally accepted single class,
28 or type, and bidders are notified of the open-ended nature of the work in the solicitation: *Provided,*
29 That no open-ended repair or maintenance contract may exceed \$500,000. Work performed as
30 part of disaster mitigation or recovery originating from a declared state of preparedness or state
31 of emergency that may not be fully identified or known at the time of letting a solicitation for bid,
32 and involving the act, trade, or process of building erecting, construction, adding, repairing,
33 remodeling, rehabilitating, reconstructing, altering, converting, improving, expanding, or
34 demolishing of a building structure, facility, road, or highway, shall also be considered a
35 construction project and may be procured according to this article on an open-ended basis, so
36 long as the open-ended nature of the contract is disclosed in the solicitation and the type of work
37 to be completed is generally known and identified in the solicitation in a way that allows for fair
38 and competitive bidding under this article.

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

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

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

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

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

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

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

56 (g) The apparent low bidder on a contract valued at more than \$250,000 for the
57 construction, alteration, decoration, painting, or improvement of a new or existing building or
58 structure with a state spending unit shall submit a list of all subcontractors who will perform more
59 than \$25,000 worth of work on the project including labor and materials. This section does not
60 apply to other construction projects such as highway, mine reclamation, water, or sewer projects.
61 The list shall include the names of the bidders and the license numbers as required by §21-11-1
62 *et seq.* of this code. This information shall be provided to the state spending unit within one
63 business day of the opening of bids for review prior to the awarding of a construction contract. If
64 the apparent low bidder fails to submit the subcontractor list, the spending unit shall promptly
65 request by telephone and electronic mail that the low bidder and second low bidder provide the
66 subcontractor list within one business day of the request. Failure to submit the subcontractor list

67 within one business day of receiving the request shall result in disqualification of the bid. A
68 subcontractor list may not be required if the bidder provides notice in the bid submission or in
69 response to a request for a subcontractor list that no subcontractors who will perform more than
70 \$25,000 worth of work will be used to complete the project.

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

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

74 (2) The state spending unit refuses to approve a subcontractor in the original bid because
75 the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under
76 §5A-3-32 of this code; or

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

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

87 (j) The contracting public entity shall not award a contract pursuant to this section to any
88 bidder that is known to be in default on any monetary obligation owed to the state or a political
89 subdivision of the state, including, but not limited to, obligations related to payroll taxes, property
90 taxes, sales and use taxes, fire service fees, or other fines or fees. Any governmental entity may
91 submit to the Division of Purchasing information which identifies vendors that qualify as being in
92 default on a monetary obligation to the entity. The contracting public entity shall take reasonable

93 steps to verify whether the lowest qualified bidder is in default pursuant to this subsection prior to
94 awarding a contract.

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

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

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

106 (n) Nothing in this section applies to:

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

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

111 (3) Emergency repairs to building components, systems, and public infrastructure. For the
112 purpose of this subdivision, the term "emergency repairs" means repairs that if not made
113 immediately will seriously impair the use of building components, systems, and public
114 infrastructure or cause danger to persons using the building components, systems, and public
115 infrastructure; and

116 (4) A situation where the state or subdivision thereof reaches an agreement with
117 volunteers, or a volunteer group, in which the governmental body will provide construction or
118 repair materials, architectural, engineering, technical, or other professional services, and the

119 volunteers will provide the necessary labor without charge to, or liability upon, the governmental
120 body.

NOTE: The purpose of this bill is to permit work performed as part of disaster mitigation or recovery originating from a declared state of preparedness or state of emergency be contracted out on an open-ended basis.

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