

HB 4449

FILED

2008 MAR 31 PM 12: 25

OF WEST VIRGINIA  
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATURE**  
SECOND REGULAR SESSION, 2008



**ENROLLED**

**House Bill No. 4449**

(By Delegates M. Poling and Paxton)



Passed March 8, 2008

In Effect Ninety Days from Passage

**E N R O L L E D**

**FILED**

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**H. B. 4449**

WEST VIRGINIA  
LEGISLATURE

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(BY DELEGATES M. POLING AND PAXTON)

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[Passed March 8, 2008; in effect ninety days from passage.]

AN ACT to amend and reenact §18B-5-4 of the Code of West Virginia, 1931, as amended, relating to purchase or acquisition of materials, supplies, equipment, services and printing; and extending to the Higher Education Policy Commission and the West Virginia Council for Community and Technical College Education the authority to enter into lease-purchase agreements for capital improvements, including equipment.

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

That §18B-5-4 of the Code of West Virginia, 1931, be amended and reenacted to read as follows:

**ARTICLE 5. HIGHER EDUCATION BUDGETS AND EXPENDITURES.**

**§18B-5-4. Purchase or acquisition of materials, supplies, equipment, services and printing.**

- 1 (a) The Council, Commission and each governing board,
- 2 through the Vice Chancellor for Administration, shall

3 purchase or acquire all materials, supplies, equipment,  
4 services and printing required for that governing board or the  
5 Council or Commission, as appropriate, and the state  
6 institutions of higher education under their jurisdiction,  
7 except the governing boards of Marshall University and West  
8 Virginia University, respectively, are subject to the  
9 provisions of subsection (d) of this section.

10 (b) The Commission and Council jointly shall adopt rules  
11 governing and controlling acquisitions and purchases in  
12 accordance with the provisions of this section. The rules  
13 shall assure that the Council, Commission and governing  
14 boards:

15 (1) Do not preclude any person from participating and  
16 making sales thereof to the governing board or to the Council  
17 or Commission except as otherwise provided in section five  
18 of this article. Provision of consultant services such as  
19 strategic planning services does not preclude or inhibit the  
20 governing boards, Council or Commission from considering  
21 any qualified bid or response for delivery of a product or a  
22 commodity because the consultant services are rendered;

23 (2) Establish and prescribe specifications, in all proper  
24 cases, for materials, supplies, equipment, services and  
25 printing to be purchased;

26 (3) Adopt and prescribe such purchase order, requisition  
27 or other forms as may be required;

28 (4) Negotiate for and make purchases and acquisitions in  
29 such quantities, at such times and under contract, in the open  
30 market or through other accepted methods of governmental  
31 purchasing as may be practicable in accordance with general  
32 law;

33 (5) Advertise for bids on all purchases exceeding twenty-  
34 five thousand dollars, to purchase by means of sealed bids  
35 and competitive bidding or to effect advantageous purchases  
36 through other accepted governmental methods and practices;

37 (6) Post notices of all acquisitions and purchases for  
38 which competitive bids are being solicited in the purchasing  
39 office of the specified institution involved in the purchase, at  
40 least two weeks prior to making such purchases and ensure  
41 that the notice is available to the public during business  
42 hours;

43 (7) Provide for purchasing in the open market;

44 (8) Provide for vendor notification of bid solicitation and  
45 emergency purchasing;

46 (9) Provide that competitive bids are not required for  
47 purchases of twenty-five thousand dollars or less; and

48 (10) Provide for not fewer than three bids where bidding  
49 is required. If fewer than three bids are submitted, an award  
50 may be made from among those received.

51 (c) When a state institution of higher education submits  
52 a contract, agreement or other document to the Attorney  
53 General for approval as to form as required by this chapter  
54 the following conditions apply:

55 (1) "Form" means compliance with the Constitution and  
56 statutes of the State of West Virginia.

57 (2) The Attorney General does not have the authority to  
58 reject a contract, agreement or other document based on the  
59 substantive provisions therein or any extrinsic matter so long  
60 as it complies with the Constitution and statutes of this State.

61 (3) Within fifteen days of receipt, the Attorney General  
62 shall notify the appropriate state institution of higher  
63 education in writing that the contract, agreement or other  
64 document is approved or disapproved as to form. If the  
65 contract, agreement or other document is disapproved as to  
66 form, the notice of disapproval shall identify each defect that  
67 supports the disapproval.

68 (4) If the state institution elects to challenge the  
69 disapproval by filing a Writ of Mandamus or other action and  
70 prevails, then the Attorney General shall pay reasonable  
71 attorney fees and costs incurred.

72 (d) Pursuant to this subsection, the governing boards of  
73 Marshall University and West Virginia University,  
74 respectively, may:

75 (1) Purchase or acquire all materials, supplies, equipment,  
76 services and printing required for the governing board  
77 without approval from the Commission or the Vice  
78 Chancellor for Administration and may issue checks in  
79 advance to cover postage as provided in subsection (f) of this  
80 section;

81 (2) Make purchases from cooperative buying groups,  
82 consortia, the federal government or from federal government  
83 contracts if the materials, supplies, services, equipment or  
84 printing to be purchased is available from these groups and  
85 if this would be the most financially advantageous manner of  
86 making the purchase;

87 (3) Select and acquire by contract or lease all grounds,  
88 buildings, office space or other space, and capital  
89 improvements, including equipment, the rental of which is  
90 necessarily required by the governing board; and

91       (4) Use purchase cards under terms approved for the  
92 Commission, the Council and governing boards of state  
93 institutions of higher education and participate in any  
94 expanded program of use as provided in subsection (w) of  
95 this section.

96       (e) The governing boards shall adopt sufficient  
97 accounting and auditing procedures and promulgate and  
98 adopt appropriate rules subject to the provisions of section  
99 six, article one of this chapter to govern and control  
100 acquisitions, purchases, leases and other instruments for  
101 grounds, buildings, office or other space, and capital  
102 improvements, including equipment, or lease-purchase  
103 agreements.

104       (f) The Council, Commission or each governing board,  
105 through the Vice Chancellor for Administration, may issue a  
106 check in advance to a company supplying postage meters for  
107 postage used by that board, the Council or Commission and  
108 by the state institutions of higher education under their  
109 jurisdiction.

110       (g) When a purchase is to be made by bid, any or all bids  
111 may be rejected. However, all purchases based on advertised  
112 bid requests shall be awarded to the lowest responsible bidder  
113 taking into consideration the qualities of the articles to be  
114 supplied, their conformity with specifications, their suitability  
115 to the requirements of the governing boards, Council or  
116 Commission and delivery terms. The preference for resident  
117 vendors as provided in section thirty-seven, article three,  
118 chapter five-a of this code apply to the competitive bids made  
119 pursuant to this section.

120       (h) The governing boards, Council and Commission shall  
121 maintain a purchase file, which shall be a public record and  
122 open for public inspection. After the award of the order or

123 contract, the governing boards, Council and Commission  
124 shall indicate upon the successful bid that it was the  
125 successful bid and shall further indicate why bids are rejected  
126 and, if the mathematical low vendor is not awarded the order  
127 or contract, the reason therefor. A record in the purchase file  
128 may not be destroyed without the written consent of the  
129 Legislative Auditor. Those files in which the original  
130 documentation has been held for at least one year and in  
131 which the original documents have been reproduced and  
132 archived on microfilm or other equivalent method of  
133 duplication may be destroyed without the written consent of  
134 the Legislative Auditor. All files, no matter the storage  
135 method, shall be open for inspection by the Legislative  
136 Auditor upon request.

137 (i) The Commission and Council also jointly shall adopt  
138 rules to prescribe qualifications to be met by any person who  
139 is to be employed as a buyer pursuant to this section. These  
140 rules shall require that a person may not be employed as a  
141 buyer unless that person, at the time of employment, either is:

142 (1) A graduate of an accredited college or university; or

143 (2) Has at least four years' experience in purchasing for  
144 any unit of government or for any business, commercial or  
145 industrial enterprise.

146 (j) Any person making purchases and acquisitions  
147 pursuant to this section shall execute a bond in the penalty of  
148 fifty thousand dollars, payable to the State of West Virginia,  
149 with a corporate bonding or surety company authorized to do  
150 business in this state as surety thereon, in form prescribed by  
151 the Attorney General and conditioned upon the faithful  
152 performance of all duties in accordance with this section and  
153 sections five through eight, inclusive, of this article and the  
154 rules of the governing board and the Council and

155 Commission. In lieu of separate bonds for such buyers, a  
156 blanket surety bond may be obtained. Any such bond shall  
157 be filed with the Secretary of State. The cost of any such  
158 bond shall be paid from funds appropriated to the applicable  
159 governing board or the Council or Commission.

160 (k) All purchases and acquisitions shall be made in  
161 consideration and within limits of available appropriations  
162 and funds and in accordance with applicable provisions of  
163 article two, chapter five-a of this code relating to expenditure  
164 schedules and quarterly allotments of funds.  
165 Notwithstanding any other provision of this code to the  
166 contrary, only those purchases exceeding the dollar amount  
167 for competitive sealed bids in this section are required to be  
168 encumbered and they may be entered into the state's  
169 centralized accounting system by the staff of the  
170 Commission, Council or governing boards to satisfy the  
171 requirements of article two, chapter five-a of this code and  
172 specifically sections twenty-six, twenty-seven and twenty-  
173 eight of said article to determine whether the amount of the  
174 purchase is within the Commission's, Council's or governing  
175 board's quarterly allotment, is in accordance with the  
176 approved expenditure schedule and otherwise conforms to  
177 the provisions of said article.

178 (l) The governing boards, Council and Commission may  
179 make requisitions upon the Auditor for a sum to be known as  
180 an advance allowance account, not to exceed five percent of  
181 the total of the appropriations for the governing board,  
182 Council or Commission, and the Auditor shall draw a warrant  
183 upon the Treasurer for such accounts. All advance allowance  
184 accounts shall be accounted for by the applicable governing  
185 board or the Council or Commission once every thirty days  
186 or more often if required by the State Auditor.

187 (m) Contracts entered into pursuant to this section shall  
188 be signed by the applicable governing board or the Council



189 or Commission in the name of the state and shall be approved  
190 as to form by the Attorney General. A contract which  
191 requires approval as to form by the Attorney General is  
192 considered approved if the Attorney General has not  
193 responded within fifteen days of presentation of the contract.  
194 A contract or a change order for that contract and  
195 notwithstanding any other provision of this code to the  
196 contrary, associated documents such as performance and  
197 labor/material payments, bonds and certificates of insurance  
198 which use terms and conditions or standardized forms  
199 previously approved by the Attorney General and do not  
200 make substantive changes in the terms and conditions of the  
201 contract do not require approval as to form by the Attorney  
202 General. The Attorney General shall make a list of those  
203 changes which he or she considers to be substantive and the  
204 list, and any changes thereto, shall be published in the State  
205 Register. A contract that exceeds the dollar amount requiring  
206 competitive sealed bids in this section shall be filed with the  
207 State Auditor. If requested to do so, the governing boards,  
208 Council or Commission shall make all contracts available for  
209 inspection by the State Auditor. The governing board,  
210 Council or Commission, as appropriate, shall prescribe the  
211 amount of deposit or bond to be submitted with a bid or  
212 contract, if any, and the amount of deposit or bond to be  
213 given for the faithful performance of a contract.

214 (n) If the governing board, Council or Commission  
215 purchases or contracts for materials, supplies, equipment,  
216 services and printing contrary to the provisions of sections  
217 four through seven of this article or the rules pursuant  
218 thereto, such purchase or contract is void and of no effect.

219 (o) Any governing board or the Council or Commission,  
220 as appropriate, may request the Director of purchases to make  
221 available, from time to time, the facilities and services of that  
222 department to the governing boards, Council or Commission

223 in the purchase and acquisition of materials, supplies,  
224 equipment, services and printing and the director of  
225 purchases shall cooperate with that governing board, Council  
226 or Commission, as appropriate, in all such purchases and  
227 acquisitions upon such request.

228 (p) Each governing board or the Council or Commission,  
229 as appropriate, shall permit private institutions of higher  
230 education to join as purchasers on purchase contracts for  
231 materials, supplies, services and equipment entered into by  
232 that governing board or the Council or Commission. Any  
233 private school desiring to join as purchasers on such purchase  
234 contracts shall file with that governing board or the Council  
235 or Commission an affidavit signed by the president of the  
236 institution of higher education or a designee requesting that  
237 it be authorized to join as purchaser on purchase contracts of  
238 that governing board or the Council or Commission, as  
239 appropriate. The private school shall agree that it is bound by  
240 such terms and conditions as that governing board or the  
241 Council or Commission may prescribe and that it will be  
242 responsible for payment directly to the vendor under each  
243 purchase contract.

244 (q) Notwithstanding any other provision of this code to  
245 the contrary, the governing boards, Council and Commission,  
246 as appropriate, may make purchases from cooperative buying  
247 groups, consortia, the federal government or from federal  
248 government contracts if the materials, supplies, services,  
249 equipment or printing to be purchased is available from  
250 cooperative buying groups, consortia, the federal government  
251 or from a federal contract and purchasing from the  
252 cooperative buying groups, consortia, federal government or  
253 from a federal government contract would be the most  
254 financially advantageous manner of making the purchase.

255 (r) An independent performance audit of all purchasing  
256 functions and duties which are performed at any state

257 institution of higher education, except Marshall University  
258 and West Virginia University, shall be performed each fiscal  
259 year. The Joint Committee on Government and Finance shall  
260 conduct the performance audit and the governing boards,  
261 Council and Commission, as appropriate, are responsible for  
262 paying the cost of the audit from funds appropriated to the  
263 governing boards, Council or Commission.

264 (1) The governing boards of Marshall University and  
265 West Virginia University, respectively, shall provide for  
266 independent performance audits of all purchasing functions  
267 and duties on their campuses at least once in each three-year  
268 period.

269 (2) Each audit shall be inclusive of the entire time period  
270 that has elapsed since the date of the preceding audit.

271 (3) Copies of all appropriate documents relating to any  
272 audit performed by the governing boards of Marshall  
273 University and West Virginia University shall be furnished  
274 to the Joint Committee on Government and Finance and the  
275 Legislative Oversight Commission on Education  
276 Accountability within thirty days of the date the audit report  
277 is completed.

278 (s) The governing boards shall require each institution  
279 under their respective jurisdictions to notify and inform every  
280 vendor doing business with that institution of the provisions  
281 of section fifty-four, article three, chapter five-a of this code,  
282 also known as the Prompt Pay Act of 1990.

283 (t) Consultant services, such as strategic planning  
284 services, do not preclude or inhibit the governing boards,  
285 Council or Commission from considering any qualified bid  
286 or response for delivery of a product or a commodity because  
287 of the rendering of those consultant services.

288 (u) The Commission or Council may enter into lease-  
289 purchase agreements for capital improvements, including  
290 equipment, on behalf of or for the benefit of state institutions  
291 of higher education, the Commission or Council. After the  
292 Commission or Council, as appropriate, has granted approval  
293 for lease-purchase agreements by the governing boards, a  
294 governing board, may enter into lease-purchase agreements  
295 for capital improvements, including equipment, except the  
296 governing boards of Marshall University and West Virginia  
297 University may enter into lease-purchase agreements for the  
298 state institutions of higher education known as Marshall  
299 University and West Virginia University without seeking the  
300 approval of the Commission or the Council. Any lease-  
301 purchase agreement so entered shall constitute a special  
302 obligation of the State of West Virginia. The obligation  
303 under a lease-purchase agreement so entered may be from  
304 any funds legally available to the Commission, Council or the  
305 institution and must be cancelable at the option of the  
306 Commission, Council or the governing board or institution at  
307 the end of any fiscal year. The obligation, any assignment or  
308 securitization thereof, never constitutes an indebtedness of  
309 the State of West Virginia or any department, agency or  
310 political subdivision thereof, within the meaning of any  
311 constitutional provision or statutory limitation, and may not  
312 be a charge against the general credit or taxing powers of the  
313 state or any political subdivision thereof. Such facts shall be  
314 plainly stated in any lease-purchase agreement. Further, the  
315 lease-purchase agreement shall prohibit assignment or  
316 securitization without consent of the lessee and the approval  
317 of the agreement as to form by the Attorney General of West  
318 Virginia. Proposals for any agreement shall be requested in  
319 accordance with the requirements of this section and any  
320 rules or guidelines of the Commission and Council. In  
321 addition, any lease-purchase agreement which exceeds one  
322 hundred thousand dollars total shall be approved as to form  
323 by the Attorney General of West Virginia. The interest

324 component of any lease-purchase obligation is exempt from  
325 all taxation of the State of West Virginia, except inheritance,  
326 estate and transfer taxes. It is the intent of the Legislature  
327 that if the requirements set forth in the Internal Revenue  
328 Code of 1986, as amended, and any regulations promulgated  
329 pursuant thereto are met, the interest component of any lease-  
330 purchase obligation also is exempt from the gross income of  
331 the recipient for purposes of federal income taxation and may  
332 be designated by the governing board or the president of the  
333 institution as a bank-qualified obligation.

334 (v) Notwithstanding any other provision of this code to  
335 the contrary, the Commission, Council and governing boards  
336 have the authority, in the name of the state, to lease, or offer  
337 to lease, as lessee, any grounds, buildings, office or other  
338 space in accordance with this paragraph and as provided  
339 below:

340 (1) The Commission, Council and governing boards have  
341 sole authority to select and to acquire by contract or lease all  
342 grounds, buildings, office space or other space, the rental of  
343 which is necessarily required by the Commission, Council or  
344 governing boards for the institutions under their jurisdiction.  
345 For state institutions of higher education other than Marshall  
346 University and West Virginia University, the Chief Executive  
347 Officer of the Commission, Council or an institution shall  
348 certify the following:

349 (A) That the grounds, buildings, office space or other  
350 space requested is necessarily required for the proper  
351 function of the Commission, Council or institution;

352 (B) That the Commission, Council or institution will be  
353 responsible for all rent and other necessary payments in  
354 connection with the contract or lease; and

355 (C) That satisfactory grounds, buildings, office space or  
356 other space is not available on grounds and in buildings  
357 currently owned or leased by the Commission, Council or the  
358 institution. Before executing any rental contract or lease, the  
359 Commission, Council or a governing board shall determine  
360 the fair rental value for the rental of the requested grounds,  
361 buildings, office space or other space, in the condition in  
362 which they exist, and shall contract for or lease the premises  
363 at a price not to exceed the fair rental value.

364 (2) The Commission, Council and governing boards are  
365 authorized to enter into long-term agreements for buildings,  
366 land and space for periods longer than one fiscal year but not  
367 to exceed forty years. Any purchase of real estate, any lease-  
368 purchase agreement and any construction of new buildings or  
369 other acquisition of buildings, office space or grounds  
370 resulting therefrom, pursuant to the provisions of this  
371 subsection shall be presented by the Commission or Council,  
372 as appropriate, to the Joint Committee on Government and  
373 Finance for prior review. Any such lease shall contain, in  
374 substance, all the following provisions:

375 (A) That the Commission, Council or governing board,  
376 as lessee, has the right to cancel the lease without further  
377 obligation on the part of the lessee upon giving thirty days'  
378 written notice to the lessor at least thirty days prior to the last  
379 day of the succeeding month;

380 (B) That the lease is considered canceled without further  
381 obligation on the part of the lessee if the Legislature or the  
382 federal government fails to appropriate sufficient funds  
383 therefor or otherwise acts to impair the lease or cause it to be  
384 canceled; and

385 (C) That the lease is considered renewed for each ensuing  
386 fiscal year during the term of the lease unless it is canceled

387 by the Commission, Council or governing board before the  
388 end of the then-current fiscal year.

389 (3) The Commission, Council or institution which is  
390 granted any grounds, buildings, office space or other space  
391 leased in accordance with this section may not order or make  
392 permanent changes of any type thereto, unless the  
393 Commission, Council or governing board, as appropriate, has  
394 first determined that the change is necessary for the proper,  
395 efficient and economically sound operation of the institution.  
396 For purposes of this section, a "permanent change" means  
397 any addition, alteration, improvement, remodeling, repair or  
398 other change involving the expenditure of state funds for the  
399 installation of any tangible thing which cannot be  
400 economically removed from the grounds, buildings, office  
401 space or other space when vacated by the institution.

402 (4) Leases and other instruments for grounds, buildings,  
403 office or other space, once approved by the Commission,  
404 Council or governing board, may be signed by the Chief  
405 Executive Officer of the Commission, Council or institution.  
406 Any lease or instrument exceeding one hundred thousand  
407 dollars annually shall be approved as to form by the Attorney  
408 General. A lease or other instrument for grounds, buildings,  
409 office or other space that contains a term, including any  
410 options, of more than six months for its fulfillment shall be  
411 filed with the State Auditor.

412 (5) The Commission and Council jointly may promulgate  
413 rules they consider necessary to carry out the provisions of  
414 this section. The governing boards of Marshall University  
415 and West Virginia University shall promulgate rules pursuant  
416 to section six, article one of this chapter to implement the  
417 provisions of this section.

418 (w) Purchasing card use may be expanded by the  
419 Council, Commission and state institutions of higher  
420 education pursuant to the provisions of this subsection.

421 (1) The Council and Commission jointly shall establish  
422 procedures to be implemented by the Council, Commission  
423 and any institution under their respective jurisdictions using  
424 purchasing cards. The procedures shall ensure that each  
425 maintains:

426 (A) Appropriate use of the purchasing card system;

427 (B) Full compliance with the provisions of article three,  
428 chapter twelve of this code relating to the purchasing card  
429 program; and

430 (C) Sufficient accounting and auditing procedures for all  
431 purchasing card transactions.

432 (2) By the first day of November, two thousand four, the  
433 Council and Commission jointly shall present the procedures  
434 to the Legislative Oversight Commission on Education  
435 Accountability for its adoption.

436 (3) Notwithstanding any other provision of this code to  
437 the contrary, if the Legislative Oversight Commission on  
438 Education Accountability adopts the procedures, the Council,  
439 Commission, and any institution authorized pursuant to  
440 subdivision (4) of this subsection, may use purchasing cards  
441 for:

442 (A) Travel expenses directly related to the job duties of  
443 the traveling employee, including fuel and food; and

444 (B) Any routine, regularly scheduled payment, including,  
445 but not limited to, utility payments and real property rental



446 fees. The Council, Commission and each institution,  
447 annually by the thirtieth day of June, shall provide to the  
448 State Purchasing Division a list of all goods or services for  
449 which payment was made pursuant to this provision during  
450 that fiscal year.

451 (4) The Commission and Council each shall evaluate the  
452 capacity of each institution under its jurisdiction for  
453 complying with the procedures established pursuant to  
454 subdivision (3) of this subsection. The Commission and  
455 Council each shall authorize expanded use of purchasing  
456 cards pursuant to said subdivision for any such institution it  
457 determines has the capacity to comply.

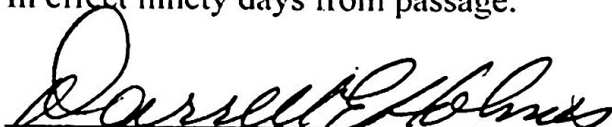
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

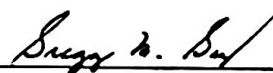
  
\_\_\_\_\_  
Chairman Senate Committee

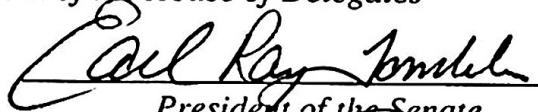
  
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Chairman House Committee

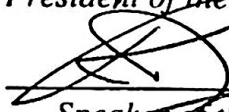
Originating in the House.

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 28<sup>th</sup>  
day of March, 2008.

  
\_\_\_\_\_  
Governor

PRESENTED TO THE  
GOVERNOR

MAR 25 2008

Time 10:20am