WEST VIRGINIA CODE: §15A-3-14

§15A-3-14. Exempt from Purchasing Division; purchasing procedures.

(a) The provisions established in §5A-3-1 *et seq*. of this code do not apply to the division or any institution under the control of the division.

(b) When the cost under any contract or agreement entered into by the division, other than compensation for personal services, involves an expenditure of more than $10,000 and less than $25,000, the division shall solicit at least three bids, if possible, from vendors and make a written contract, or agreement, with the lowest responsible bidder. When the cost under any contract or agreement entered into by the division, other than compensation for personal services, involves an expenditure of $25,000 or more, the division shall make a written contract with the lowest responsive, responsible bidder after public notice is published, which notice shall state the general character of the work and general character of the materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids. The notice may be published by an advertising medium the division deems advisable. The division may also solicit sealed bids by sending requests by mail or electronic transmission to prospective vendors. But a contract for lease of a correctional facility is not subject to the foregoing requirements and the division may enter into the contract for lease pursuant to negotiation upon the terms and conditions and for the period as it finds to be reasonable and proper under the circumstances and in the best interests of proper operation or efficient acquisition or construction of the projects. The division may reject any and all bids. A bond with good and sufficient surety, approved by the division, may be required by the division. The good and sufficient surety may be in the form of a bid bond, performance bond, payment bond, maintenance bond, labor and materials bond, or any other type of surety deemed necessary by the division.

(c) The division may use best value procurement to enter into a contract when the commissioner determines in writing that it is advantageous to the state.

(1) A solicitation for bids under best value procurement shall be made in the same manner as provided in this section.

(2) Best value procurement awards shall be based on criteria set forth in the solicitation and information contained in the proposals submitted in response to the solicitation. Those criteria include, but are not limited to, price and the total cost of acquiring, operating, maintaining, and supporting a commodity or service over its projected lifetime, as well as technical criteria. The technical criteria may include, but are not limited to, the evaluated technical merit of the bidder’s bid or proposal, the bidder’s past performance, the degree to which a proposal exceeds other proposals in technical merit, the utility of any novel or unrequested items in the proposal, and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that

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accomplishes the business objectives set forth in the solicitation.

(3) The award must be made to the highest scoring responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the state, taking into consideration all evaluation factors set forth in the best value solicitation.

(4) The division may not use best value procurement to enter into government construction contracts, including, but not limited to, those set forth in §5-22-1 *et seq*. of this code.

(d)(1) The division may make a direct award of a contract without competitive bidding if:

(A) The commissioner shall make a written determination that the direct award is in the best interest of the state;

(B) The division documents in writing that competition is not available because there is no other source for the commodity or service, or that no other source would be willing or able to replace the existing source without a detrimental effect on the division, the existence of a detrimental effect being determined by the commissioner in his or her sole discretion;

(C) The division publicly advertises a notice of intent to make a direct award without competition in the state's official bid notification system, as well as any other public advertisement that the division deems appropriate, for no less than 10 business days; and

(D) No other vendor expresses an interest in providing the commodity or service in question.

(2) If a vendor expresses an interest in providing the commodity or service described in the notice of intent to make a direct award, then the division must convert the direct award to a competitive bid, unless the commissioner determines that the interest expressed by a vendor is unreasonable. The competitive bid may, at the discretion of the commissioner, be either a request for quotation or request for proposal.

(3) The notice of intent to make a direct award shall contain the following information:

(A) A description of the commodity or service for which a direct award will be made;

(B) A time period by which delivery must be made or performance must occur;

(C) The price that will be paid for the commodity or service;

(D) Any limitations that a competing vendor would need to satisfy;

(E) An invitation to all vendors interested in providing the commodity or service to make that interest known; and

(F) Contact information for the commissioner or his or her designee, and instructions to submit a statement of interest to the commissioner or his or her designee.

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(e) The commissioner, or division, shall not award a contract or renew a contract to any vendor or prospective vendor when the vendor or prospective vendor, or a related party to the vendor or prospective vendor, is a debtor and:

(1) The debt owed is an amount greater than $1,000 in the aggregate; or

(2) The debtor is in employer default.

(f) The division has the authority to run criminal background checks, financial background checks, a licensing check, and a credit check, and any vendor, or any and all principals in a company or corporation, must submit to said checks to be eligible to be awarded a contract for the division. The commissioner, or division, shall not award a contract to a vendor if any of the following are present:

(1) Conviction of an offense involving fraud or a felony offense in connection with obtaining or attempting to obtain a public contract or subcontract;

(2) Conviction of any federal or state antitrust statute relating to the submission of offers;

(3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property in connection with the performance of a contract;

(4) Conviction of a felony offense demonstrating a lack of business integrity or business honesty that affects the present responsibility of the vendor or subcontractor;

(5) Default on obligations owed to the state, including, but not limited to, obligations owed to the Workers' Compensation Fund, as defined in §23-2C-1 *et seq*. of this code, and obligations under the West Virginia Unemployment Compensation Act and West Virginia state tax and revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into a repayment agreement with the appropriate agency of the state or has entered into a repayment agreement but does not remain in compliance with its obligations under the repayment agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a vendor granted an exemption under any rule of the Bureau of Employment Programs or the Insurance Commissioner, the commissioner may award a contract: *Provided*, That in no event may the contract be awarded to any vendor who has not paid all current state obligations for at least the four most recent calendar quarters, excluding the current calendar quarter, or with respect to any vendor who is in default on a repayment agreement with an agency of the state;

(6) The vendor is not in good standing with a licensing board, in that the vendor is not licensed when licensure is required by the law of this state, or the vendor has been found to be in violation of an applicable licensing law after notice, opportunity to be heard, and other due process required by law;

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(7) The vendor is an active and knowing participant in dividing or planning procurements to circumvent the $25,000 threshold requiring a sealed bid or otherwise avoid the use of a sealed bid; or

(8) Violation of the terms of public contracts or subcontracts for:

(A) Willful failure to substantially perform in accordance with the terms of one or more public contracts;

(B) Performance in violation of standards established by law or generally accepted standards of the trade or profession amounting to intentionally deficient or grossly negligent performance on one or more public contracts;

(C) Use of substandard materials on one or more public contracts or defects in construction in one or more public construction projects amounting to intentionally deficient or grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a construction project and expiration of any warranty thereunder;

(D) A repeated pattern or practice of failure to perform so serious and compelling as to justify disqualification; or

(E) Any other cause of a serious and compelling nature amounting to knowing and willful misconduct of the vendor that demonstrates a wanton indifference to the interests of the public and that caused, or that had a substantial likelihood of causing, serious harm to the public.

(g) Unless the context clearly requires a different meaning, for the purposes of this section, the term:

(1) "Debt" means any assessment, premium, penalty, fine, tax, or other amount of money owed to the state or any of its political subdivisions because of a judgment, fine, permit violation, license assessment, amounts owed to the Workers' Compensation Fund as defined in §23-2C-1 *et seq*. of this code, penalty, or other assessment or surcharge presently delinquent or due and required to be paid to the state or any of its political subdivisions, including any interest or additional penalties accrued thereon;

(2) "Debtor" means any individual, corporation, partnership, association, limited liability company, or any other form of business association owing a debt to the state or any of its political subdivisions, and includes any person or entity that is in employer default;

(3) "Employer default" means having an outstanding balance or liability to the Old Fund or to the Uninsured Employers' Fund or being in policy default, as defined in §23-2C-2 of this code, failure to maintain mandatory workers' compensation coverage, or failure to fully meet its obligations as a workers' compensation self-insured employer. An employer is not in employer default if it has entered into a repayment agreement with the Insurance Commissioner and remains in compliance with the obligations under the repayment

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agreement;

(4) “Political subdivision” means any county commission; municipality; county board of education; any instrumentality established by a county or municipality; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; or any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties or municipalities; and

(5) “Related party” means a party, whether an individual, corporation, partnership, association, limited liability company, or any other form of business association or other entity whatever, related to any vendor by blood, marriage, ownership, or contract through which the party has a relationship of ownership or other interest with the vendor so that the party will actually, or by effect, receive or control a portion of the benefit, profit, or other consideration from performance of a vendor contract with the party receiving an amount that meets or exceeds five percent of the total contract amount.

(h) The prohibitions of subdivision (5), subsection (f) of this section do not apply where a vendor has contested any tax administered pursuant to chapter 11 of this code, amount owed to the Workers’ Compensation Fund as defined in §23-2C-1 *et seq*. of this code, permit fee, or environmental fee or assessment and the matter has not become final, or where the vendor has entered into a payment plan or agreement and the vendor is not in default of any of the provisions of such plan or agreement.

(i) The division may disqualify a vendor if award to the vendor would jeopardize the safe, secure, and orderly operations of the division.

(j) All bids, contract proposals, or contracts with the state or any of its political subdivisions submitted or approved under the provisions of this code shall include an affidavit that the vendor, prospective vendor, or a related party to the vendor or prospective vendor is not in employer default and does not owe any debt in an amount in excess of $1,000 or, if a debt is owed, that the provisions of subsection (h) of this section apply.

(k) If the division has to make a purchase under emergency conditions, or an emergency situation, that jeopardizes the safe, secure, and orderly operations of the division, as deemed by the commissioner, and approved by the Secretary of the Department of Military Affairs and Public Safety, subsection (b) of this section shall not apply.

(l) The commissioner may enter into agreements with medical schools and institutions of higher education in this state to develop standards for appropriate and innovative medical programming and care for inmates: *Provided*, That the division will follow the procedures set forth in subsection (b) of this section for delivery of regular and normal medical care within the facilities.

(m) Notwithstanding any other provision of this code to the contrary, any records obtained in

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response to solicitations for bids from the division shall not be subject to disclosure pursuant to §29B-1-1 *et seq*. of this code, until and unless the time frame for submission of bids has closed: *Provided*, That once bids close, the records may be exempt from disclosure pursuant to §29B-1-4 of this code. Any record relating to any solicitation for, or purchase of, any item related to the safe and secure running of any facility under the jurisdiction of the Commissioner of the Division of Corrections and Rehabilitation is not subject to disclosure pursuant to §29B-1-1 *et seq*. of this code.

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