
WEST VIRGINIA CODE CHAPTER 5
ARTICLE 22

WV Legislature

§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.

(a) This section and the requirements in this section may be referred to as the West Virginia Fairness in Competitive Bidding Act.

(b) As used in this section:

(1) "Alternates" means any additive options or alternative designs included in a solicitation for competitive bids that are different from and priced separately from what is included in a base bid.

(2) "Construction project" means a specifically identified scope of work involving the act, trade, or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating, reconstructing, altering, converting, improving, expanding, or demolishing of a building, structure, facility, road, or highway. Repair and maintenance of existing public improvements that are recurring or ongoing in nature and that are not fully identified or known at any one time shall be considered a construction project and procured according to this article on an open-ended basis, so long as the work to be performed under the contract falls into a generally accepted single class, or type, and bidders are notified of the open-ended nature of the work in the solicitation: *Provided*, That no open-ended repair or maintenance contract may exceed \$500,000. A construction project does not include a design-build project as set forth in §5-22A-1 *et seq.* of this code or a construction management at-risk project as set forth in §5-22B-1 *et seq.* of this code.

(3) "Lowest qualified responsible bidder" means the bidder that bids the lowest price and that meets, at a minimum, all the following requirements in connection with the bidder's response to the bid solicitation. The bidder shall certify that it:

(A) Is ready, able, and willing to timely furnish the labor and materials required to complete the contract;

(B) Is in compliance with all applicable laws of the State of West Virginia; and

(C) Has supplied a valid bid bond or other surety authorized or approved by the contracting public entity.

(4) "The state and/or its subdivisions" means the state of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities, and all county boards of education.

(5) "State spending unit" means a department, agency, or institution of the state government for which an appropriation is requested, or to which an appropriation is made by the Legislature.

(c) The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding \$50,000 in total cost.

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

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

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

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

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

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

(g) The apparent low bidder on a contract valued at more than \$250,000 for the construction, alteration, decoration, painting, or improvement of a new or existing building or structure with a state spending unit shall submit a list of all subcontractors who will perform more than \$25,000 worth of work on the project including labor and materials. This section does not apply to other construction projects such as highway, mine reclamation, water, or sewer projects. The list shall include the names of the bidders and the license numbers as required by §30-42-1 *et seq.* of this code. This information shall be provided to the state spending unit within one business day of the opening of bids for review prior to the awarding of a construction contract. If the apparent low bidder fails to submit the subcontractor list, the state spending unit shall promptly request by telephone and electronic mail that the low bidder and second low bidder provide the subcontractor list within one business day of the request. Failure to submit the subcontractor list within one business day of receiving the request shall result in disqualification of the bid. A subcontractor list may not be required if the bidder provides notice in the bid submission or in response to a request for a subcontractor list that no subcontractors who will perform more than \$25,000 worth of work will be used to complete the project.

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

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

- (2) The state spending unit refuses to approve a subcontractor in the original bid because the subcontractor is under a debarment pursuant to §5A-3-33d of this code or a suspension under §5A-3-32 of this code; or
- (3) The contractor certifies in writing that the subcontractor listed in the original bill fails, is unable, or refuses to perform the subcontract.
- (i) The contracting public entity may not award the contract to a bidder which fails to meet the minimum requirements set out in this section. As to a prospective low bidder which the contracting public entity determines not to have met one or more of the requirements of this section or other requirements as determined by the public entity in the written bid solicitation, prior to the time a contract award is made, the contracting public entity shall document in writing and in reasonable detail the basis for the determination and shall place the writing in the bid file. After the award of a bid under this section, the bid file of the contracting public agency and all bids submitted in response to the bid solicitation shall be open and available for public inspection.
- (j) The contracting public entity shall not award a contract pursuant to this section to any bidder that is known to be in default on any monetary obligation owed to the state or a political subdivision of the state, including, but not limited to, obligations related to payroll taxes, property taxes, sales and use taxes, fire service fees, or other fines or fees. Any governmental entity may submit to the Division of Purchasing information which identifies vendors that qualify as being in default on a monetary obligation to the entity. The contracting public entity shall take reasonable steps to verify whether the lowest qualified bidder is in default pursuant to this subsection prior to awarding a contract.
- (k) A public official or other person who individually or together with others knowingly makes an award of a contract under this section in violation of the procedures and requirements of this section is subject to the penalties set forth in §5A-3-29 of this code.
- (l) No officer or employee of this state or of a public agency, public authority, public corporation, or other public entity and no person acting or purporting to act on behalf of an officer or employee or public entity may require that a performance bond, payment bond, or surety bond required or permitted by this section be obtained from a particular surety company, agent, broker, or producer.
- (m) All bids shall be open in accordance with the provisions of §5-22-2 of this code, except design-build projects which are governed by §5-22A-1 *et seq.* of this code and are exempt from these provisions.
- (n) Nothing in this section applies to:
- (1) Work performed on construction or repair projects by regular full-time employees of the state or its subdivisions;

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

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

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

§5-22-1a. Permitting government construction contracts arising out of declared states of emergency on open-ended quantity or unit price basis; types of contracts allowed for construction projects; specific location of construction project not required in solicitation; certain bonds discretionary; other bidding requirements applicable.

(a) The state, not including its subdivisions, may solicit competitive bids for construction projects arising out of a state of emergency declared pursuant to §15-5-6 of this code, in a manner that is open-ended as to quantity only, or for unit prices on estimated quantities, and may also award contracts to multiple qualified responsible bidders, thereby creating a pool of qualified responsible bidders, so long as the nature of the contract is fully disclosed in the solicitation in a way that allows for fair and competitive bidding. The state reserves the right to reject a bid that it deems to be nonresponsive, a bid from a bidder that is not qualified responsible, as defined in the first section of this article, or a bid that is higher than the state is willing to pay.

(b) If the state creates a pool of qualified responsible bidders, it must first offer work available to the multiple contract holders to the contract holder identified as the lowest qualified responsible bidder, and if that vendor is unable or unwilling to perform, then the same work must be extended to the contract holder identified as the second lowest qualified responsible bidder, and so on, until the work is either accepted or there are no remaining qualified responsible bidders holding a contract that are willing to perform the work. If no vendors accept the work, the state may revise the work and reoffer it to the lowest qualified responsible bidder, then the second lowest qualified responsible bidder, and so on.

(c) Solicitations or contracts under this section are not required to specify the exact addresses or identify the locations of the construction project, so long as the solicitation and resulting contract clearly articulate the mechanism by which the exact address or location will be identified prior to work being performed.

(d) For projects limited to the construction or replacement of one or more residential dwellings or appurtenances, the state agency responsible for overseeing the work may, in its discretion, choose not to require an entity to whom the contract is awarded to furnish payment or performance bonds, but only if it clearly indicates in the solicitation for bids that payment or performance bonds will not be required: Provided, That in the event a payment or performance bond is not required, the entity responsible for the contract shall provide to the state agency responsible for overseeing the work a document certifying that all of the claims of subcontractors, laborers, materialmen, and all persons furnishing material have been paid, satisfied, and discharged before final payment is released.

(e) A vendor or contractor that has been debarred pursuant to §5A-3-33f of this code may not bid on or be awarded a contract under this section.

(f) Except where other provisions of this article conflict with the provisions of this section, the other provisions of this article remain in effect.

§5-22-2. Designation of time and place for opening of bids; right to reject or withdraw bid; bid resubmission; bid validity date.

(a) The public entity accepting public contract bids shall, in its resolution providing for the contract or purchase and for the advertisement for bids, designate the time and place that the bids will be received and shall at that time and place publicly open the bids and read them aloud. No public entity may accept or take any bid, including receiving any hand-delivered bid, after the time advertised to take bids. No bid may be opened on days which are recognized as holidays by the United States Postal Service. No public entity may accept or consider any bids that do not contain a valid bid bond or other surety approved by the state of West Virginia or its subdivisions.

(b) The provisions and requirements of this section, §5-22-1 of this code, the requirements stated in the advertisement for bids, and the requirements on the bid form may not be waived by any public entity. The public entity may only reject an erroneous bid after the opening if all of the following conditions exist: (1) An error was made; (2) the error materially affected the bid; (3) rejection of the bid would not cause a hardship on the public entity involved, other than losing an opportunity to receive construction projects at a reduced cost; and (4) enforcement of the bid in error would be unconscionable. If a public entity rejects a bid, it shall maintain a file of documented evidence demonstrating that all the conditions set forth in this subdivision existed. If the public entity determines the bid to be erroneous, the public entity shall return the bid security to the contractor.

(c) A contractor who withdraws a bid under the provisions of this section may not resubmit a bid on the same project. If the bid withdrawn is the lowest bid, the next lowest bid may be accepted.

(d) The provisions of a bid shall remain valid and legally binding for a period of 90 calendar days. The 90 days begin to run from the date of the bid opening as prescribed by the public entity bid solicitation. The 90-day period as set forth in this section may be extended by mutual agreement of the contractor and the public entity. Any extension shall be in writing.

§5-22-3. Certain labor requirements not to be imposed on contractor or subcontractor.

(a) This section may be known and cited as The Fair and Open Competition in Governmental Construction Act.

(b) Legislative findings. -- The Legislature finds that to promote and ensure fair competition on governmental, governmental funded or governmental assisted construction projects that open competition in governmental construction contracts is necessary. The Legislature also finds that when a governmental entity awards a grant, tax abatement or tax credit that it should be an open and fair process. Therefore, to prevent discrimination against governmental bidders, offerors, contractors or subcontractors based upon labor affiliation or the lack thereof, the Legislature declares that project labor agreements should not be part of the competitive bid process or be a condition for a grant, tax abatement or tax credit.

(c) Definitions. -- For purposes of this section:

(1) "Construction" means the act, trade or process of building, erecting, constructing, adding, repairing, remodeling, rehabilitating, reconstructing, altering, converting, improving, expanding or demolishing of a building, structure, facility, road or highway, and includes the planning, designing and financing of a specific construction project.

(2) "Governmental entity" means the state, a political subdivision or any agency or spending unit thereof.

(3) "Project labor agreement" means any pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

(d) Prohibition - Competitive bid. -- Commencing July 1, 2015, a governmental entity or a construction manager acting on behalf of a governmental entity, seeking a construction bid solicitation, awarding a construction contract or obligating funds to a construction contract, shall not include the following in the bid specifications, bid requests, project agreements or any other controlling documents for the construction project:

(1) A requirement or prohibition that a bidder, offeror, contractor or subcontractor must enter into or adhere to a project labor agreement;

(2) A term, clause or statement that infers, either directly or indirectly, that a bidder, offeror, contractor or subcontractor must enter into or adhere to a project labor agreement;

(3) A term, clause or statement that rewards or punishes a bidder, offeror, contractor or subcontractor for becoming or remaining, or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, a project labor agreement; or

(4) Any other provision dealing with project labor agreements.

(e) Prohibition - Grant, tax abatement or tax credit. -- Commencing July 1, 2015, a governmental entity may not award a grant, tax abatement or tax credit for construction that is conditioned upon a requirement that the awardee include any prohibited provision set out in subsection (d) of this section.

(f) Exclusions. -- This section does not:

(1) Prohibit a governmental entity from awarding a contract, grant, tax abatement or tax credit to a private owner, bidder, contractor or subcontractor who enters into or who is party to an agreement with a labor organization, if being or becoming a party or adhering to an agreement with a labor organization is not a condition for award of the contract, grant, tax abatement or tax credit, and if the governmental entity does not discriminate against a private owner, bidder, contractor or subcontractor in the awarding of that contract, grant, tax abatement or tax credit based upon the status as being or becoming, or the willingness or refusal to become, a party to an agreement with a labor organization.

(2) Prohibit a private owner, bidder, contractor or subcontractor from voluntarily entering into or complying with an agreement entered into with one or more labor organizations in regard to a contract with a governmental entity or funded, in whole or in part, from a grant, tax abatement or tax credit from the governmental entity.

(3) Prohibit employers or other parties from entering into agreements or engaging in any other activity protected by the National Labor Relations Act, 29 U. S. C. §§151 to 169.

(4) Interfere with labor relations of parties that are left unregulated under the National Labor Relations Act, 29 U. S. C. §§151 to 169.

(g) Exemptions. -- The head of a governmental entity may exempt a particular project, contract, subcontract, grant, tax abatement or tax credit from the requirements of any or all of the provisions of subsections (d) and (e) of this section if the governmental unit finds, after public notice and a hearing, that special circumstances require an exemption to avert an imminent threat to public health or safety. A finding of special circumstances under this subsection may not be based on the possibility or presence of a labor dispute concerning the use of contractors or subcontractors who are nonsignatories to, or otherwise do not adhere to, agreements with one or more labor organizations or concerning employees on the project who are not members of or affiliated with a labor organization.

§5-22-4. Negotiation when all bids exceed budgeted amount.

- (a) The state and its subdivisions may establish a maximum budgeted amount for each construction project. In the event the bids for a construction project exceed the funds available, the contracting public agency may negotiate with the lowest qualified responsible bidder pursuant to the provisions of this section.
- (b) To utilize the provisions of this section, the contracting public agency shall:
- (1) Establish a maximum budgeted amount;
 - (2) Maintain confidentiality of the maximum budgeted amount prior to the award of a contract; and
 - (3) Not proceed with a negotiated award if that results in more than a 10 percent change in cost from the original base bid.
- (c) A negotiated award made pursuant to the provisions of this section shall be made within 60 calendar days of the original bid opening date.
- (d) Negotiations under this section shall be completed in the following manner:
- (1) If only one responsive and responsible bidder responds to a solicitation the contracting agency may negotiate an award based solely on the specifications contained within the original solicitation;
 - (2) If more than one bidder responds to a solicitation, the contracting public agency may negotiate with the apparent lowest qualified responsible bidder, as defined in §5-22-1 of this code: *Provided*, That any such negotiation must be based on the specifications contained within the original solicitation;
 - (3) The contracting public agency shall make available for public inspection all negotiated contracts; and
 - (4) The contracting public agency shall memorialize any change to the original project specifications that occur as a result of a negotiated award made pursuant to the provisions of this section.
- (e) The provisions of this section are permissive and not mandatory for any contracting public agency.
- (f) An award of a negotiated contract pursuant to the provisions of this section may not be made to a bidder who fails to meet the other qualifications set forth in this article.
- (g) For the purposes of this section, "construction project" does not mean the construction of a road, bridge, or highway.

(h) The provisions of this section expire and shall have no force and effect after December 31, 2029.

WV Legislature