WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2004

ENROLLED

House Bill No. 3150
(By Delegates Calvert and Amores)

Passed March 13, 2004
In Effect Ninety Days from Passage
AN ACT to amend and reenact §5-22-1 of the code of West Virginia, 1931, as amended; to amend and reenact §5-22A-10 of said code; to amend and reenact §7-11B-14 of said code; and to amend and reenact §38-2-39 of said code, all relating to establishing the West Virginia fairness in competitive bidding act; definitions; establishing procedures and requirements for awarding contracts for government construction projects; requirements for performance, payment, bid and surety bonds; and criminal penalties.

Be it enacted by the Legislature of West Virginia:

That §5-22-1 of the code of West Virginia, 1931, as amended, be amended and reenacted; that §5-22A-10 of said code be amended and reenacted; that §7-11B-14 of said code be amended and reenacted; and that §38-2-39 of said code be amended and reenacted, all to read as follows:

CHAPTER 5. GENERAL POWERS AND AUTHORITY OF THE GOVERNOR, SECRETARY OF STATE AND ATTORNEY GENERAL; BOARD OF PUBLIC WORKS; MISCELLANEOUS AGENCIES, COMMISSIONS,
OFFICES, PROGRAMS, ETC.

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.

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

(b) As used in this section:

(1) “Lowest qualified responsible bidder” means the bidder that bids the lowest price and that meets, as a minimum, all the following requirements in connection with the bidder’s response to the bid solicitation. The bidder must 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.

(2) “The state and 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.

(c) The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost:
Provided, That a vendor who has been debarred pursuant to the provisions of sections thirty-three-a through thirty-three-f, inclusive, article three, chapter five-a of this code may not bid on or be awarded a contract under this section. 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.

(d) 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: Provided, That the state and its subdivisions may reject all bids and solicit new bids on the project.

(e) 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 any prospective low bidder which the contracting public entity determines not to have met any 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.

(f) Any 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 section twenty-nine, article three, chapter five-a of the code of West Virginia.

(g) No officer or employee of this state or of any public agency, public authority, public corporation or other public entity and no person acting or purporting to act on behalf of
such officer or employee or public entity shall require that any
performance bond, payment bond or surety bond required or
permitted by this section be obtained from any particular surety
company, agent, broker or producer.

(h) All bids shall be open in accordance with the provisions
of section two of this article, except design-build projects which
are governed by article twenty-two-a of this chapter and are
exempt from these provisions.

(i) Nothing in this section shall apply 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 and systems.
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 and systems or cause
danger to those persons using the building components and
systems; and

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

ARTICLE 22A. DESIGN-BUILD PROCUREMENT ACT.

§5-22A-10. Solicitation of proposals.
Proposals must be solicited from not less than three design-builders. A request for proposal must be prepared for each design-build contract and shall consist of, but not be limited to:

(1) The identity of the agency which will award the design-build contract;

(2) The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, and the procedures for making awards, including a reference to the requirements of this article, the rules promulgated herein and any regulations pertaining to the agency;

(3) The proposed terms and conditions for the design-build contract;

(4) The performance criteria;

(5) The description of the drawings, specifications or other submittals to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or submittals that will be acceptable;

(6) A schedule for planned commencement and completion of the design-build contract;

(7) Budget limits for the design-build contract, if any;

(8) Design-builder qualifications; and

(9) Requirements for performance bonds, payment bonds and insurance: Provided, That no officer or employee of this state or of any public agency, public authority, public corporation, or other public entity, and no person acting or purporting to act on behalf of such officer or employee or public entity shall require that any performance bond, payment bond, or bid
bond required or permitted by this section be obtained from any
particular surety company, agent, broker or producer.

The request for proposals may include any other informa-
tion that the agency, at its discretion, chooses to supply,
including, but not limited to, surveys, soils reports, drawings or
models of existing structures, environmental studies, photo-
graphs or references to public records.

Notice of requests for proposals must be advertised as
prescribed by the procedures utilized by the purchasing division
pursuant to article three, chapter five-a of this code.

CHAPTER 7. COUNTY COMMISSIONS AND OFFICERS.

ARTICLE 11B. WEST VIRGINIA TAX INCREMENT FINANCING ACT.

§7-11B-14. Projects financed by tax increment financing consid-
ered to be public improvements subject to prevail-
ing wage, local labor preference and competitive
bid requirements.

(a) Any project acquired, constructed, or financed, in whole
or in part, by a county commission or municipality under this
article shall be considered to be a “public improvement” within
the meaning of the provisions of articles one-c and five-a,
chapter twenty-one of this code.

(b) The county commission or municipality shall, except as
provided in subsection (c) of this section, solicit or require
solicitation of competitive bids and require the payment of
prevailing wage rates as provided in article five-a, chapter
twenty-one of this code and compliance with article one-c of
said chapter for every project or infrastructure project funded
pursuant to this article exceeding twenty-five thousand dollars
in total cost.
(c) Following the solicitation of the bids, the construction contract shall be awarded to the lowest qualified responsible bidder, who shall furnish a sufficient performance and payment bond: Provided, That the county commission, municipality or other person soliciting the bids may reject all bids and solicit new bids on the project.

(d) No officer or employee of this state or of any public agency, public authority, public corporation, or other public entity, and no person acting or purporting to act on behalf of such officer or employee or public entity shall require that any performance bond, payment bond, or bid bond required or permitted by this section be obtained from any particular surety company, agent, broker or producer.

(e) This section does not:

(1) Apply to work performed on construction projects not exceeding a total cost of fifty thousand dollars by regular full-time employees of the county commission or the municipality: Provided, That no more than fifty thousand dollars shall be expended on an individual project in a single location in a twelve-month period;

(2) Prevent students enrolled in vocational educational schools from being used in construction or repair projects when such use is a part of the students’ training program;

(3) Apply to emergency repairs to building components and systems: Provided, That the term “emergency repairs” means repairs that, if not made immediately, will seriously impair the use of the building components and systems or cause danger to those persons using the building components and systems; or

(4) Apply to any situation where the county commission or municipality comes to an agreement with volunteers, or a volunteer group, by which the governmental body will provide
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construction or repair materials, architectural, engineering, technical or any other professional services and the volunteers will provide the necessary labor without charge to, or liability upon, the governmental body: Provided, That the total cost of the construction or repair projects does not exceed fifty thousand dollars.

(f) The provisions of subsection (b) of this section apply to privately owned projects or infrastructure projects constructed on lands not owned by the county commission, a municipality or a government agency or instrumentality when the owner or the owner’s agent or person financing the owner’s project receives money from the tax increment financing fund for the owner’s project.

CHAPTER 38. LIENS.

ARTICLE 2. MECHANICS’ LIENS.

§38-2-39. Public building; bond of contractor; recordation of bond; no lien in such case.

1 It shall be the duty of the state commissioner of public institutions, and of all county courts, boards of education, boards of trustees, and other legal bodies having authority to contract for the erection, construction, improvement, alteration or repair of any public building or other structure, or any building or other structure used or to be used for public purposes, to require of every person to whom it shall award, and with whom it shall enter into, any contract for the erection, construction, improvement, alteration or repair of any such public building or other structure used or to be used for public purposes, that such contractor shall cause to be executed and delivered to the secretary of such commissioner or other legal body, or other proper and designated custodian of the papers and records thereof, a good, valid, solvent and sufficient bond, in a penal sum equal at the least to the reasonable cost of the
materials, machinery, equipment and labor required for the completion of such contract, and conditioned that in the event such contractor shall fail to pay in full for all such materials, machinery, equipment and labor delivered to him for use in the erection, construction, improvement, alteration or repair of such public building or other structure, or building or other structure used or to be used for public purposes, then such bond and the sureties thereon shall be responsible to such materialman, furnisher of machinery or equipment, and furnisher or performer of such labor, or their assigns, for the full payment of the full value thereof.

No officer or employee of this state or of any public agency, public authority, public corporation, or other public entity, and no person acting or purporting to act on behalf of such officer or employee or public entity shall require that any surety bond required or permitted by this section be obtained from any particular surety company, agent, broker or producer.

All such bonds shall have as surety thereon either some incorporated bonding and/or surety company authorized to carry on business in this state, or in lieu of such corporate surety the contractor may deposit as security for such bond with the said state commissioner of public institutions, county court, board of education, board of trustees or other legal body having authority so to contract, a sum in cash or bonds and securities of the United States of America or of the state of West Virginia of sufficient amount and value equal at least to the reasonable cost of materials, machinery, equipment and labor required for the completion of such contract. Immediately upon the acceptance of either of said bonds by the state commissioner of public institutions, county court, board of education and board of trustees, or other legal body, the bond shall be recorded by the secretary of such commissioner or other legal body, or by the proper designated custodian of the papers or records thereof, in the office of the clerk of the county court of the county or
counties wherein such work is to be done and where such materials, machinery or equipment are to be delivered, and no such contract shall be binding and effective upon either party or parties thereto until such bond has been executed, delivered and recorded as aforesaid.

Nothing in this article shall be construed to give a lien upon such a public building or improvement as is mentioned in this section, or upon the land upon which such public building or improvement is situated.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Greg Butcher
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 approved this the 7th day of April, 2004.

Governor