WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2006

ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4031

(By Mr. Speaker, (Mr. Kiss), and Delegate Trump)
[By Request of the Executive]

Passed March 10, 2006

In Effect Ninety Days from Passage
ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4031

(BY MR. SPEAKER, (MR. KISS), AND DELEGATE TRUMP)

[BY REQUEST OF THE EXECUTIVE]

[Passed March 10, 2006; in effect ninety days from passage.]

AN ACT to repeal §5A-3-33a of the Code of West Virginia, 1931, as amended; to amend and reenact §5A-1-1 of said code; to amend and reenact §5A-3-4, §5A-3-5, §5A-3-10, §5A-3-10a, §5A-3-11, §5A-3-19, §5A-3-33d and §5A-3-45 of said code; to amend said code by adding thereto six new sections, designated §5A-3-9a, §5A-3-10b, §5A-3-10c, §5A-3-11a, §5A-3-11b and §5A-3-11c; and to amend and reenact §5A-3C-11 of said code, all relating to the Purchasing Division of the Department of Administration; providing for the powers and duties of the director; defining certain terms; providing for the director to promulgate legislative rules on contract management procedures, division procedures for oversight of contract management, cancellation of contracts and selling surplus commodities by means of an internet auction site; increasing the annual vendor fee; establishing a fund for fees; providing for specification standards to include cost of mainte-
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... and expected life of commodities; increasing the minimum contract amount requiring competitive bids; providing for competitive bids to be opened publicly; providing requirements for competitive bids; requiring spending units to report multiple contract awards to a single vendor; authorizing the director to conduct compliance reviews of spending units; providing for bids by electronic transmission; providing for bid solicitation requirements; modifying prohibition against awarding contracts to debtors of state; providing for best value procurement; providing for sole source procurement; providing requirements for open market purchases; increasing the maximum amount of purchases which may be made in the open market; providing requirements for contract awards; providing requirements for the delivery of bids to the Purchasing Division; deleting the requirements for duplicate bids; authorizing the director to engage in negotiations and discussions with responsible bidders and to obtain best and final offers; providing for contract awards to multiple vendors; authorizing the director to participate in, sponsor, conduct or administer cooperative purchasing agreements or consortia; providing grounds for debarment of vendors; providing for the disposition of surplus state property by means of an internet auction site; and providing that contracts executed pursuant to the Pharmaceutical Availability and Affordability Act of 2004 are not subject to state purchasing requirements.

Be it enacted by the Legislature of West Virginia:

That §5A-3-33a of the Code of West Virginia, 1931, as amended, be repealed; that §5A-1-1 of said code be amended and reenacted; that §5A-3-4, §5A-3-5, §5A-3-10, §5A-3-10a, §5A-3-11, §5A-3-19, §5A-3-33d and §5A-3-45 of said code be amended and reenacted; that said code be amended by adding thereto six new sections, designated §5A-3-9a, §5A-3-10b, §5A-3-10c, §5A-3-11a, §5A-3-11b and §5A-3-11c; and that §5A-3C-11 of said code be amended and reenacted, all to read as follows:
ARTICLE 1. DEPARTMENT OF ADMINISTRATION.

§5A-1-1. Definitions.

For the purpose of this chapter:

(1) "Commodities" means supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of State Government.

(2) "Contractual services" means telephone, telegraph, electric light and power, water and similar services.

(3) "Debarment" means the exclusion of a vendor from the right to bid on contracts to sell goods or supply services to the state or its subdivisions for a specified period of time.

(4) "Director" means the director of the division referred to in the heading of the article in which the word appears.

(5) "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.

(6) "Electronic transmission" or "electronically transmitted" means any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval and reproduction of information by the recipient.

(7) "Expendable commodities" means those commodities which, when used in the ordinary course of business, will become consumed or of no market value within the period of one year or less.

(8) "Nonprofit workshops" means an establishment: (a) Where any manufacture or handiwork is carried on; (b) which
is operated either by a public agency or by a cooperative or by a nonprofit private corporation or nonprofit association, in which no part of the net earnings thereof inures, or may lawfully inure, to the benefit of any private shareholder or individual; (c) which is operated for the primary purpose of providing remunerative employment to blind or severely disabled persons who cannot be absorbed into the competitive labor market; and (d) which shall be approved, as evidenced by a certificate of approval, by the State Board of Vocational Education, Division of Vocational Rehabilitation.

(9) "Printing" means printing, binding, ruling, lithographing, engraving and other similar services.

(10) "Record" means information that is inscribed on a read-only tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(11) "Removable property" means any personal property not permanently affixed to or forming a part of real estate.

(12) "Request for quotations" means a solicitation for a bid where cost is the primary factor in determining the award.

(13) "Responsible bidder" means a vendor who has the capability to fully perform the contract requirements, and the integrity and reliability which will assure good faith performance.

(14) "Responsive bidder" means a vendor who has submitted a bid which conforms in all material respects to the bid solicitation.

(15) "Secretary" means the Secretary of Administration.

(16) "Spending officer" means the executive head of a spending unit, or a person designated by him or her.
(17) "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.

(18) "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.

(19) "Vendor" means any person or entity that is registered with the Purchasing Division to supply the state or its subdivisions with commodities or services and lessors of real property.

ARTICLE 3. PURCHASING DIVISION.

§5A-3-4. Rules of director.

(a) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to:

(1) Authorize a spending unit to purchase specified commodities directly and prescribe the manner in which such purchases shall be made;

(2) Authorize, in writing, a spending unit to purchase commodities in the open market for immediate delivery in emergencies, define such emergencies and prescribe the manner in which such purchases shall be made and reported to the director; and for the purposes mentioned in subdivision (1) and this subdivision (2), the head of any spending unit, or the financial governing board of any institution, may, with the approval of the director, make requisitions upon the Auditor for a sum to be known as an advance allowance account, in no case to exceed five percent of the total of the appropriations for any such spending unit, and the Auditor shall draw his or her warrant upon the Treasurer for such accounts; and all such
advance allowance accounts shall be accounted for by the head
of the spending unit or institution once every thirty days or
more frequently if required by the State Auditor or director;

(3) Prescribe the manner in which commodities shall be
purchased, delivered, stored and distributed;

(4) Prescribe the time for making requisitions and estimates
of commodities, the future period which they are to cover, the
form in which they shall be submitted and the manner of their
authentication;

(5) Prescribe the manner of inspecting all deliveries of
commodities, and making chemical and physical tests of
samples submitted with bids and samples of deliveries to
determine compliance with specifications;

(6) Prescribe the amount of deposit or bond to be submitted
with a bid or contract and the amount of deposit or bond to be
given for the faithful performance of a contract;

(7) Prescribe a system whereby the director shall be
required, upon the payment by a vendor of an annual fee
established by the director, to give notice to such vendor of all
bid solicitations for commodities of the type with respect to
which such vendor specified notice was to be given, but no such
fee shall exceed the cost of giving the notice to such vendor,
nor shall such fee exceed the sum of one hundred twenty-five
dollars per fiscal year nor shall such fee be charged to persons
seeking only reimbursement from a spending unit;

(8) Prescribe that each state contract entered into by the
Purchasing Division shall contain provisions for liquidated
damages, remedies, or provisions for the determination of the
amount or amounts which the vendor shall owe as damages, in
the event of default under such contract by such vendor;
(9) Prescribe contract management procedures for all state contracts except government construction contracts including but not limited to those set forth in article twenty-two, chapter five of this code;

(10) Prescribe procedures by which oversight is provided to actively monitor spending unit purchases, including but not limited to, all technology and software commodities and contractual services exceeding one million dollars, approval of change orders and final acceptance by the spending units.

(11) Prescribe that each state contract entered into by the purchasing division contain provisions for cancellation of the contract upon thirty days’ notice to the vendor;

(12) Prescribe procedures for selling surplus commodities to the highest bidder by means of an internet auction site; and

(13) Provide for such other matters as may be necessary to give effect to the foregoing rules and the provisions of this article.

(b) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to prescribe qualifications to be met by any person who on and after the effective date of this section is to be employed in the Purchasing Division as a state buyer. The rules must provide that a person may not be employed as a state buyer unless he or she at the time of employment either is: (1) A graduate of an accredited college or university; or (2) has at least four years’ experience in purchasing for any unit of government or for any business, commercial or industrial enterprise. Persons serving as state buyers are subject to the provisions of article six, chapter twenty-nine of this code.

§5A-3-5. Purchasing section standard specifications – Promulgation and adoption by director; applicable to all purchases.
The director shall promulgate and adopt standard specifications based on scientific and technical data for appropriate commodities, which shall establish the quality to which commodities to be purchased and services to be contracted for by the state must conform. Standard specifications shall apply to every future purchase of or contract for the commodities described in the specifications and shall include information relating to the cost of maintenance and expected life of the commodity if the director determines there are nationally accepted industry standards for the commodity. No purchases by any spending unit may be exempt from compliance with the standard specifications so established, but the director may exempt the purchase of particular items from the standard specifications if it is considered necessary and advisable. The director shall update the standard specifications, as necessary.

§5A-3-9a. Creation of a Fund.

The "Vendor Registration Payment Fund" is hereby redesignated and continued as the "Vendor Fee Fund," and the balance remaining upon the effective date of this section shall remain upon redesignation. Moneys deposited in this fund shall be administered by the purchasing division and used for the purposes established in this article. Expenditures are to be made only in accordance with appropriation by the Legislature and in accordance with the provisions of article three, chapter twelve of this code and upon the fulfillment of the provisions of article two, chapter eleven-b of this code: Provided, That for the fiscal year beginning the first day of July, two thousand six, expenditures are authorized from deposits rather than pursuant to appropriations by the Legislature.

Amounts collected which are found from time to time to exceed the funds needed for purposes set forth in this article may be transferred to other accounts or funds and used for other purposes by appropriation of the Legislature.
§5A-3-10. Competitive bids; publication of solicitations for sealed bids; purchase of products of nonprofit workshops; employee to assist in dealings with nonprofit workshops.

(a) A purchase of and contract for commodities, printing and services shall be based, whenever possible, on competitive bids.

(b) The director shall solicit sealed bids for the purchase of commodities and printing which is estimated to exceed twenty-five thousand dollars. No spending unit shall issue a series of requisitions or divide or plan procurements to circumvent this twenty-five thousand dollar threshold or otherwise avoid the use of sealed bids. Any spending unit which awards multiple contracts for the same or similar commodity or service to an individual vendor over any twelve-month period, the total value of which exceeds twenty-five thousand dollars, shall file copies of all contracts awarded to the vendor within the twelve preceding months with the director immediately upon exceeding the twenty-five thousand dollar limit, along with a statement explaining how the multiple contract awards do not circumvent the twenty-five thousand dollar threshold. If the spending unit does not immediately report to the director, the director may suspend the purchasing authority of the spending unit until the spending unit complies with the reporting requirement of this subsection. The director may conduct a review of any spending unit to ensure compliance with this subsection. Following a review, the director shall complete a report summarizing his or her findings and forward the report to the spending unit. In addition, the director shall report to the Joint Committee on government and finance on the first day of January and July of each year the spending units which have reported under this subsection and the findings of the director.

(c) The director may permit bids by electronic transmission to be accepted in lieu of sealed bids.
(d) Bids shall be solicited by public notice. The notice may be published by any advertising medium the director deems advisable. The director may also solicit sealed bids by sending requests by mail or electronic transmission to prospective vendors.

(e) The director shall, without competitive bidding, purchase commodities and services produced and offered for sale by nonprofit workshops, as defined in section one, article one of this chapter, which are located in this state: Provided, That such commodities and services shall be of a fair market price and of like quality comparable to other commodities and services otherwise available as determined by the director with the advice of the committee on the purchase of commodities and services from the handicapped.

To encourage contracts for commodities and services with nonprofit workshops, the director shall employ a person whose responsibilities in addition to other duties shall be to identify all commodities and services available for purchase from nonprofit workshops, to evaluate the need of the state for commodities and services to coordinate the various nonprofit workshops in their production efforts and to make available to such workshops information about available opportunities within state government for purchase of commodities or services which might be produced and sold by such workshops. Funds to employ such a person shall be included annually in the budget.

§5A-3-10a. Prohibition for awarding contracts to vendors which owe a debt to the state or its political subdivisions.

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

(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 funds as defined in article two-c of chapter twenty-three 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 or business association owing a debt to the state or any of its political subdivisions.

(3) "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.

(4) "Related party" means a party, whether an individual, corporation, partnership, association, limited liability company or any other form or business association or other entity whatsoever, 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.

(b) No contract or renewal of any contract may be awarded by the state or any of its political subdivisions 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 the debt owed is an amount greater than one thousand dollars in the aggregate.

(c) The prohibition of this section does not apply where a vendor has contested any tax administered pursuant to chapter eleven of this code, amount owed to the workers' compensation funds as defined in article two-c of chapter twenty-three 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.

(d) 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 does not owe any debt in an amount in excess of one thousand dollars or, if a debt is owed, that the provisions of subsection (c) of this section apply.

§5A-3-10b. Best value procurement.

(a) The Director may utilize best value procurement to enter into a contract when he or she determines in writing that it is advantageous to the state.

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

(c) Best value procurement awards shall be based on criteria set forth in the solicitation including, but not limited to, price, the total cost of acquiring, operating, maintaining and supporting a commodity or service over its projected lifetime, the evaluated technical merit of the bidder's bid or proposal, the bidder's past performance, and the evaluated probability of performing the requirements stated in the solicitation on time,
with high quality, and in a manner that accomplishes the business objectives set forth in the solicitation.

(d) 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.

(e) The Director may not use best value procurement to enter into government construction contracts, including but not limited to those set forth in article twenty-two, chapter five of this code.

§5A-3-10c. Sole source procurement.

The director may award a contract without advertisement or competition if he or she determines in writing that there is only one source for the required commodity or service. The director may require the submission of cost or pricing data in connection with an award under this section. Prior to an award under this section, the spending unit requesting the procurement shall provide written documentation to the director setting forth the basis for the sole source procurement and the specific efforts made to determine the availability of other sources. Prior to a final determination by the director, the registered vendors will be notified of the commodity or service being sought and the vendors will be provided an opportunity to indicate an interest in bidding on such a commodity or service, to establish whether the commodity or service is, in fact, available only from a sole source. On an annual basis, the director shall report the spending units who have determined a sole source for their commodities or services, the type of commodity or service and the determination made by the director.

§5A-3-11. Purchasing in open market on competitive bids; debarment; bids to be based on standard specifications; period for alteration or withdrawal of bids;
(a) The director may make a purchase of commodities, printing, and services of twenty-five thousand dollars or less in amount in the open market, but the purchase shall, wherever possible, be based on at least three competitive bids, and shall include the cost of maintenance and expected life of the commodities if the director determines there are nationally accepted industry standards for the commodities being purchased.

(b) The director may authorize spending units to purchase commodities, printing and services in the amount of two thousand five hundred dollars or less in the open market without competitive bids: Provided, That the cost of maintenance and expected life of the commodities must be taken into consideration if the director determines there are nationally accepted industry standards for the commodities being purchased.

(c) Bids shall be based on the standard specifications promulgated and adopted in accordance with the provisions of section five of this article and may not be altered or withdrawn after the appointed hour for the opening of the bids.

(d) A vendor who has been debarred pursuant to the provisions of sections thirty-three-a through thirty-three-f, article three, chapter five-a of this code, may not bid on or be awarded a contract under this section.

(e) All open market orders, purchases based on advertised bid requests or contracts made by the director or by a state department shall be awarded to the lowest responsible bidder or bidders, taking into consideration the qualities of the commodities or services to be supplied, their conformity with specifications, their suitability to the requirements of the government,
the delivery terms and, if the director determines there are
nationally accepted industry standards, cost of maintenance and
the expected life of the commodities: Provided, That state bids
on school buses shall be accepted from all bidders who shall
then be awarded contracts if they meet the state board’s
“Minimum Standards for Design and Equipment of School
Buses.” County boards of education may select from those
bidders who have been awarded contracts and shall pay the
difference between the state aid formula amount and the actual
cost of bus replacement. Any or all bids may be rejected.

(f) If all bids received on a pending contract are for the
same unit price or total amount, the director has the authority to
reject all bids, and to purchase the required commodities,
printing and services in the open market, if the price paid in the
open market does not exceed the bid prices.

(g) The bid must be received by the Purchasing Division
prior to the specified date and time of the bid opening. The
failure to deliver or the nonreceipt of the bid by the Purchasing
Division prior to the appointed date and hour shall result in the
rejection of the bid. The vendor is solely responsible for the
receipt of bid by the Purchasing Division prior to the appointed
date and hour of the bid opening. All bids will be opened
publicly by two or more persons from the Purchasing Division.
Vendors will be given notice of the day, time and place of the
public bid opening. Bids may be viewed immediately after
being opened.

(h) After the award of the order or contract, the director, or
someone appointed by him or her for that purpose, shall
indicate upon the successful bid that it was the successful bid.
Thereafter, the copy of each bid in the possession of the director
shall be maintained as a public record, shall be open to public
inspection in the office of the director and may not be destroyed
without the written consent of the Legislative Auditor.
§5A-3-11a. Negotiation when all bids exceed available funds.

(a) Spending units shall include the maximum budgeted amount available for each purchase in a requisition submitted to the Purchasing division. No person may disclose this maximum budgeted amount to any vendor prior to the award of a contract. If all bids submitted pursuant to a solicitation exceed the funds available for the purchase, and the director determines in writing that there are no additional funds available from any source to permit an award to the responsive and responsible bidder and the best interest of the state will not permit the delay attendant to a resolicitation under revised specifications or for revised quantities, then a negotiated award may be made as set forth in this section.

(1) If the director determines in writing that there is only one responsive and responsible bidder, he or she may negotiate the price for a noncompetitive award or the specifications for a noncompetitive award based solely on the original purpose of the solicitation.

(2) If the Purchasing Division solicits bids with a request for quotation and there is more than one bidder, the director may negotiate with bidders determined in writing to be responsive and responsible, based on criteria contained in the bid invitation: Provided, That the Director must negotiate first with the lowest bidder. If the Director does not award the bid to the lowest bidder, he or she may close negotiations with that bidder and enter into negotiations with the next lowest bidder, and may continue to do so in like manner with the remaining responsive and responsible bidders. The director may not extend an offer to any bidder that is not first extended to the prior bidders in order of rank.

(3) If the Purchasing Division solicits bids utilizing a best value procurement, as set forth in section ten-b of this section, and there is more than one bidder, the director may negotiate
with bidders determined in writing to be responsive and responsible, based on criteria contained in the bid invitation:

Provided, That the Director must negotiate first with the highest scoring bidder. If the Director does not award the bid to the highest scoring bidder, he or she may close negotiations with that bidder and enter into negotiations with the next highest scoring bidder, and may continue to do so in like manner with the remaining responsive and responsible bidders. The director may not extend an offer to any bidder that is not first extended to the prior bidders in order of rank.

(b) After negotiations occur pursuant to subsection(a) of this section, if the director determines that more than fifteen percent of the value of the bid must be renegotiated by revising the specifications of the original solicitation, only a resolicitation may be initiated or the solicitation may be withdrawn.

(c) The Director may not renegotiate with any bidder after closing negotiations with that bidder and entering into negotiations with the next bidder.

§5A-3-11b. Discussion and final offers.

(a) As provided in the bid solicitation, the director may conduct discussions with, and obtain best and final offers from, responsive and responsible bidders who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Bidders must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing bidders.
(b) The following contracts are exempt from this section:

(1) Government construction contracts, including but not limited to those set forth in article twenty-two, chapter five of this code; and,

(2) The purchase of supplies and material.

§5A-3-11c. Multiple awards.

The director may elect to award a contract to one or more responsive and responsible bidders if the director determines in writing that a single award to an individual bidder would be insufficient: Provided, That the basis for the selection among multiple contracts at the time of purchase shall be the most practical and economical alternative and shall be in the best interests of the state.

§5A-3-19. Purchases from federal government and other sources.

(a) Notwithstanding any other provision of this article, the director may, upon the recommendation of a state spending unit, participate in, sponsor, conduct, or administer a cooperative purchasing agreement or consortium for the purchase of commodities or services with agencies of the federal government, agencies of other states, other public bodies or other state agencies, if available and financially advantageous. At the discretion of the director, bids may be solicited to determine whether participation in such a cooperative purchasing agreement or consortium is financially advantageous.

(b) The Department of Administration may approve administrative fees, not to exceed the amount of fifty thousand dollars, necessary to participate in a cooperative purchasing agreement. Fees which exceed fifty thousand dollars are subject to the competitive bid requirements of this article.

§5A-3-33d. Grounds for debarment.
Grounds for debarment are:

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 funds, as defined in article two-c of chapter twenty-three 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 Commission, the director may waive debarment under section thirty-three-f of this article: Provided, That in no event may debarment be waived with respect 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;

(7) The vendor is an active and knowing participant in dividing or planning procurements to circumvent the twenty-five thousand dollar threshold requiring a sealed bid or otherwise avoid the use of a sealed bid: or

(8) Violation of the terms of a public contract or subcontract 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 debarment; 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.

§5A-3-45. Disposition of surplus state property; semiannual report; application of proceeds from sale.

(a) The state agency for surplus property has the exclusive power and authority to make disposition of commodities or expendable commodities now owned or in the future acquired by the state when the commodities are or become obsolete or unusable or are not being used or should be replaced.

(b) The agency shall determine what commodities or expendable commodities should be disposed of and make disposition in the manner which will be most advantageous to the state. The disposition may include:

1. Transferring the particular commodities or expendable commodities between departments;
2. Selling the commodities to county commissions, county boards of education, municipalities, public service districts, county building commissions, airport authorities, parks and recreation commissions, nonprofit domestic corporations qualified as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or volunteer fire departments in this state when the volunteer fire departments have been held exempt from taxation under Section 501(c) of the Internal Revenue Code;
3. Trading in the commodities as a part payment on the purchase of new commodities;
4. Cannibalizing the commodities pursuant to procedures established under subsection (g) of this section;
(5) Properly disposing of the commodities as waste; or

(6) Selling the commodities to the highest bidder by means of public auctions or sealed bids, after having first advertised the time, terms and place of the sale as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code. The publication area for the publication is the county in which the sale is to be conducted. The sale may also be advertised in other advertising media that the agency considers advisable. The agency may sell to the highest bidder or to any one or more of the highest bidders, if there is more than one, or, if the best interest of the state will be served, reject all bids.

(7) Selling the commodities to the highest bidder by means of an internet auction site approved by the director, as set forth in an emergency rule pursuant to the provisions of chapter twenty-nine-a of this code.

(c) Upon the transfer of commodities or expendable commodities between departments, or upon the sale of commodities or expendable commodities to an eligible organization, the agency shall set the price to be paid by the receiving eligible organization, with due consideration given to current market prices.

(d) The agency may sell expendable, obsolete or unused motor vehicles owned by the state to an eligible organization, other than volunteer fire departments. In addition, the agency may sell expendable, obsolete or unused motor vehicles owned by the state with a gross weight in excess of four thousand pounds to an eligible volunteer fire department. The agency, with due consideration given to current market prices, shall set the price to be paid by the receiving eligible organization for motor vehicles sold pursuant to this provision: Provided, That the sale price of any motor vehicle sold to an eligible organiza-
tion may not be less than the "average loan" value, as published in the most recent available eastern edition of the National Automobile Dealer's Association (N. A. D. A.) Official Used Car Guide, if the value is available, unless the fair market value of the vehicle is less than the N. A. D. A. "average loan" value, in which case the vehicle may be sold for less than the "average loan" value. The fair market value shall be based on a thorough inspection of the vehicle by an employee of the agency who shall consider the mileage of the vehicle and the condition of the body, engine and tires as indicators of its fair market value. If no fair market value is available, the agency shall set the price to be paid by the receiving eligible organization with due consideration given to current market prices. The duly authorized representative of the eligible organization, for whom the motor vehicle or other similar surplus equipment is purchased or otherwise obtained, shall cause ownership and proper title to the motor vehicle to be vested only in the official name of the authorized governing body for whom the purchase or transfer was made. The ownership or title, or both, shall remain in the possession of that governing body and be nontransferable for a period of not less than one year from the date of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment prior to an elapsed period of one year may be made only by reason of certified unserviceability.

(e) The agency shall report to the Legislative Auditor, semiannually, all sales of commodities or expendable commodities made during the preceding six months to eligible organizations. The report shall include a description of the commodities sold, the price paid by the eligible organization which received the commodities and to whom each commodity was sold.

(f) The proceeds of the sales or transfers shall be deposited in the State Treasury to the credit on a pro rata basis of the fund or funds out of which the purchase of the particular commodities or expendable commodities was made: Provided, That the
agency may charge and assess fees reasonably related to the costs of care and handling with respect to the transfer, warehousing, sale and distribution of state property disposed of or sold pursuant to the provisions of this section.

(g)(1) For purposes of this section, "cannibalization" means the removal of parts from one commodity to use in the creation or repair of another commodity.

(2) The Director of the Purchasing Division shall propose for promulgation legislative rules to establish procedures that permit the cannibalization of a commodity when it is in the best interests of the state. The procedures shall require the approval of the director prior to the cannibalization of the commodity under such circumstances as the procedures may prescribe.

(3) (A) Under circumstances prescribed by the procedures, state agencies shall be required to submit a form, in writing or electronically, that, at a minimum, elicits the following information for the commodity the agency is requesting to cannibalize:

(I) The commodity identification number;

(ii) The commodity's acquisition date;

(iii) The commodity's acquisition cost;

(iv) A description of the commodity;

(v) Whether the commodity is operable and, if so, how well it operates;

(vi) How the agency will dispose of the remaining parts of the commodity; and

(vii) Who will cannibalize the commodity and how the person is qualified to remove and reinstall the parts.
(B) If the agency has immediate plans to use the cannibalized parts, the form shall elicit the following information for the commodity or commodities that will receive the cannibalized part or parts:

(i) The commodity identification number;

(ii) The commodity’s acquisition date;

(iii) The commodity’s acquisition cost;

(iv) A description of the commodity;

(v) Whether the commodity is operable;

(vi) Whether the part restores the commodity to an operable condition; and

(vii) The cost of the parts and labor to restore the commodity to an operable condition without cannibalization.

(C) If the agency intends to retain the cannibalized parts for future use, it shall provide information justifying its request.

(D) The procedures shall provide for the disposal of the residual components of cannibalized property.

(h) (1) The Director of the Purchasing Division shall propose for promulgation legislative rules to establish procedures that allow state agencies to dispose of commodities in a landfill, or by other lawful means of waste disposal, if the value of the commodity is less than the benefit that may be realized by the state by disposing of the commodity using another method authorized in this section. The procedures shall specify circumstances where the state agency for surplus property shall inspect the condition of the commodity prior to authorizing the disposal and those circumstances when the inspection is not necessary prior to the authorization.
(2) Whenever a state agency requests permission to dispose of a commodity in a landfill, or by other lawful means of waste disposal, the state agency for surplus property has the right to take possession of the commodity and to dispose of the commodity using any other method authorized in this section.

(3) If the state agency for surplus property determines, within fifteen days of receiving a commodity, that disposing of the commodity in a landfill or by other lawful means of waste disposal would be more beneficial to the state than disposing of the commodity using any other method authorized in this section, the cost of the disposal is the responsibility of the agency from which it received the commodity.


§5A-3C-11. Agency's management ability continued.

(a) Nothing contained in this article may be construed to limit the ability of the various state agencies to enter into contracts or arrangement or to otherwise to manage their pharmacy programs until such time as the programs created or authorized pursuant to this article are implemented.

(b) The provisions of article three, chapter five-a of this code do not apply to the agreements and contracts executed under the provisions of this article.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

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 4th day of April, 2006. Governor