WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008

ENROLLED

House Bill No. 4449

(By Delegates M. Poling and Paxton)

Passed March 8, 2008

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

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 5. HIGHER EDUCATION BUDGETS AND EXPENDITURES.

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

1 (a) The Council, Commission and each governing board, through the Vice Chancellor for Administration, shall
purchase or acquire all materials, supplies, equipment, services and printing required for that governing board or the Council or Commission, as appropriate, and the state institutions of higher education under their jurisdiction, except the governing boards of Marshall University and West Virginia University, respectively, are subject to the provisions of subsection (d) of this section.

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

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

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

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

(4) Negotiate for and make purchases and acquisitions in such quantities, at such times and under contract, in the open market or through other accepted methods of governmental purchasing as may be practicable in accordance with general law;
(5) Advertise for bids on all purchases exceeding twenty-five thousand dollars, to purchase by means of sealed bids and competitive bidding or to effect advantageous purchases through other accepted governmental methods and practices;

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

(7) Provide for purchasing in the open market;

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

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

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

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

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

(2) The Attorney General does not have the authority to reject a contract, agreement or other document based on the substantive provisions therein or any extrinsic matter so long as it complies with the Constitution and statutes of this State.
(3) Within fifteen days of receipt, the Attorney General shall notify the appropriate state institution of higher education in writing that the contract, agreement or other document is approved or disapproved as to form. If the contract, agreement or other document is disapproved as to form, the notice of disapproval shall identify each defect that supports the disapproval.

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

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

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

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

(3) Select and acquire by contract or lease all grounds, buildings, office space or other space, and capital improvements, including equipment, the rental of which is necessarily required by the governing board; and
(4) Use purchase cards under terms approved for the Commission, the Council and governing boards of state institutions of higher education and participate in any expanded program of use as provided in subsection (w) of this section.

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

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

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

(h) The governing boards, Council and Commission shall maintain a purchase file, which shall be a public record and open for public inspection. After the award of the order or
contract, the governing boards, Council and Commission shall indicate upon the successful bid that it was the successful bid and shall further indicate why bids are rejected and, if the mathematical low vendor is not awarded the order or contract, the reason therefor. A record in the purchase file may not be destroyed without the written consent of the Legislative Auditor. Those files in which the original documentation has been held for at least one year and in which the original documents have been reproduced and archived on microfilm or other equivalent method of duplication may be destroyed without the written consent of the Legislative Auditor. All files, no matter the storage method, shall be open for inspection by the Legislative Auditor upon request.

(i) The Commission and Council also jointly shall adopt rules to prescribe qualifications to be met by any person who is to be employed as a buyer pursuant to this section. These rules shall require that a person may not be employed as a buyer unless that person, 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.

(j) Any person making purchases and acquisitions pursuant to this section shall execute a bond in the penalty of fifty thousand dollars, payable to the State of West Virginia, with a corporate bonding or surety company authorized to do business in this state as surety thereon, in form prescribed by the Attorney General and conditioned upon the faithful performance of all duties in accordance with this section and sections five through eight, inclusive, of this article and the rules of the governing board and the Council and
Commission. In lieu of separate bonds for such buyers, a blanket surety bond may be obtained. Any such bond shall be filed with the Secretary of State. The cost of any such bond shall be paid from funds appropriated to the applicable governing board or the Council or Commission.

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

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

(m) Contracts entered into pursuant to this section shall be signed by the applicable governing board or the Council
or Commission in the name of the state and shall be approved
as to form by the Attorney General. A contract which
requires approval as to form by the Attorney General is
considered approved if the Attorney General has not
responded within fifteen days of presentation of the contract.
A contract or a change order for that contract and
notwithstanding any other provision of this code to the
contrary, associated documents such as performance and
labor/material payments, bonds and certificates of insurance
which use terms and conditions or standardized forms
previously approved by the Attorney General and do not
make substantive changes in the terms and conditions of the
contract do not require approval as to form by the Attorney
General. The Attorney General shall make a list of those
changes which he or she considers to be substantive and the
list, and any changes thereto, shall be published in the State
Register. A contract that exceeds the dollar amount requiring
competitive sealed bids in this section shall be filed with the
State Auditor. If requested to do so, the governing boards,
Council or Commission shall make all contracts available for
inspection by the State Auditor. The governing board,
Council or Commission, as appropriate, shall prescribe the
amount of deposit or bond to be submitted with a bid or
contract, if any, and the amount of deposit or bond to be
given for the faithful performance of a contract.

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

(o) Any governing board or the Council or Commission,
as appropriate, may request the Director of purchases to make
available, from time to time, the facilities and services of that
department to the governing boards, Council or Commission
in the purchase and acquisition of materials, supplies, equipment, services and printing and the director of purchases shall cooperate with that governing board, Council or Commission, as appropriate, in all such purchases and acquisitions upon such request.

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

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

(r) An independent performance audit of all purchasing functions and duties which are performed at any state
in institution of higher education, except Marshall University
and West Virginia University, shall be performed each fiscal
year. The Joint Committee on Government and Finance shall
conduct the performance audit and the governing boards,
Council and Commission, as appropriate, are responsible for
paying the cost of the audit from funds appropriated to the
governing boards, Council or Commission.

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

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

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

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

(t) Consultant services, such as strategic planning
services, do not preclude or inhibit the governing boards,
Council or Commission from considering any qualified bid
or response for delivery of a product or a commodity because
of the rendering of those consultant services.
(u) The Commission or Council may enter into lease-purchase agreements for capital improvements, including equipment, on behalf of or for the benefit of state institutions of higher education, the Commission or Council. After the Commission or Council, as appropriate, has granted approval for lease-purchase agreements by the governing boards, a governing board, may enter into lease-purchase agreements for capital improvements, including equipment, except the governing boards of Marshall University and West Virginia University may enter into lease-purchase agreements for the state institutions of higher education known as Marshall University and West Virginia University without seeking the approval of the Commission or the Council. Any lease-purchase agreement so entered shall constitute a special obligation of the State of West Virginia. The obligation under a lease-purchase agreement so entered may be from any funds legally available to the Commission, Council or the institution and must be cancelable at the option of the Commission, Council or the governing board or institution at the end of any fiscal year. The obligation, any assignment or securitization thereof, never constitutes an indebtedness of the State of West Virginia or any department, agency or political subdivision thereof, within the meaning of any constitutional provision or statutory limitation, and may not be a charge against the general credit or taxing powers of the state or any political subdivision thereof. Such facts shall be plainly stated in any lease-purchase agreement. Further, the lease-purchase agreement shall prohibit assignment or securitization without consent of the lessee and the approval of the agreement as to form by the Attorney General of West Virginia. Proposals for any agreement shall be requested in accordance with the requirements of this section and any rules or guidelines of the Commission and Council. In addition, any lease-purchase agreement which exceeds one hundred thousand dollars total shall be approved as to form by the Attorney General of West Virginia. The interest
component of any lease-purchase obligation is exempt from all taxation of the State of West Virginia, except inheritance, estate and transfer taxes. It is the intent of the Legislature that if the requirements set forth in the Internal Revenue Code of 1986, as amended, and any regulations promulgated pursuant thereto are met, the interest component of any lease-purchase obligation also is exempt from the gross income of the recipient for purposes of federal income taxation and may be designated by the governing board or the president of the institution as a bank-qualified obligation.

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

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

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

(B) That the Commission, Council or institution will be responsible for all rent and other necessary payments in connection with the contract or lease; and
(C) That satisfactory grounds, buildings, office space or other space is not available on grounds and in buildings currently owned or leased by the Commission, Council or the institution. Before executing any rental contract or lease, the Commission, Council or a governing board shall determine the fair rental value for the rental of the requested grounds, buildings, office space or other space, in the condition in which they exist, and shall contract for or lease the premises at a price not to exceed the fair rental value.

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

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

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

(C) That the lease is considered renewed for each ensuing fiscal year during the term of the lease unless it is canceled.
by the Commission, Council or governing board before the end of the then-current fiscal year.

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

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

(5) The Commission and Council jointly may promulgate rules they consider necessary to carry out the provisions of this section. The governing boards of Marshall University and West Virginia University shall promulgate rules pursuant to section six, article one of this chapter to implement the provisions of this section.
Purchasing card use may be expanded by the Council, Commission and state institutions of higher education pursuant to the provisions of this subsection.

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

(A) Appropriate use of the purchasing card system;

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

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

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

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

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

(B) Any routine, regularly scheduled payment, including, but not limited to, utility payments and real property rental
fees. The Council, Commission and each institution, annually by the thirtieth day of June, shall provide to the State Purchasing Division a list of all goods or services for which payment was made pursuant to this provision during that fiscal year.

(4) The Commission and Council each shall evaluate the capacity of each institution under its jurisdiction for complying with the procedures established pursuant to subdivision (3) of this subsection. The Commission and Council each shall authorize expanded use of purchasing cards pursuant to said subdivision for any such institution it determines has the capacity to comply.
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 28th day of March, 2008.

Governor
PRESENTED TO THE GOVERNOR

MAR 25 2008

Time 10:20AM