WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008

ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4664

(By Delegates White, Kominar Boggs and Iaquinta)

Passed March 7, 2008

In Effect Ninety Days from Passage
AN ACT to repeal §5A-3-27 of the Code of West Virginia, 1931, as amended: and to amend and reenact §5A-3-1, §5A-3-11, §5A-3-11a, §5A-3-12 and §5A-3-45 of said Code, all relating to the Purchasing Division of the Department of Administration; omitting antiquated language; revising specifications on which bids shall be based; removing requirement that Director determine in writing that no funds above budgeted amount exist to award bid; requiring city and state of residence and business addresses for vendors; and allowing the state agency for surplus property to sell commodities to the public.

Be it enacted by the Legislature of West Virginia:

That §5A-3-27 of the Code of West Virginia, 1931, as amended, be repealed: and that §5A-3-1, §5A-3-11, §5A-3-11a, §5A-3-12 and §5A-3-45 of said code be amended and reenacted, all to read as follows:

ARTICLE 3. PURCHASING DIVISION.
§5A-3-1. Division created; purpose; director; applicability of article; continuation.

(a) The Purchasing Division of the Department of Administration is continued for the purpose of establishing centralized offices to provide purchasing, and travel services to the various state agencies. No person may be appointed director of the Purchasing Division unless that person is, at the time of appointment, a graduate of an accredited college or university and has spent a minimum of ten of the fifteen years immediately preceding his or her appointment employed in an executive capacity in purchasing for any unit of government or for any business, commercial or industrial enterprise. The provisions of this article apply to all of the spending units of state government, except as otherwise provided by this article or by law.

(b) The provisions of this article do not apply to the legislative branch unless otherwise provided or the Legislature or either house requests the director to render specific services under the provisions of this chapter, nor to purchases of stock made by the Alcohol Beverage Control Commissioner, nor to purchases of textbooks for the state Board of Education.

§5A-3-11. Purchasing in open market on competitive bids; debarment; bids to be based on written specifications; period for alteration or withdrawal of bids; awards to lowest responsible bidder; uniform bids; record of bids; requirements of vendors to pay taxes, fees and debts; and exception.

(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.

(c) Bids shall be based on the written specifications in the advertised bid request 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 budget in requisition.
(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, 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.
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-3-12. Prequalification disclosure and payment of annual fee by vendors required; form and contents; register of vendors; false affidavits; penalties.

(a) The director may not accept any bid received from any vendor unless the vendor has paid the annual fee specified in section four of this article and has filed with the director an affidavit of the vendor or the affidavit of a member of the vendor's firm, or, if the vendor is a corporation, the affidavit of an officer, director or managing agent, of the corporation, disclosing the following information:

(1) If the vendor is an individual, his or her name and city and state of residence and business address, and, if he or she has associates or partners sharing in his business, their names and city and state of residence and business addresses;

(2) If the vendor is a firm, the name and city and state of residence and business address of each member, partner or associate of the firm;

(3) If the vendor is a corporation created under the laws of this state or authorized to do business in this state, the name and business address of the corporation; the names and city and state of residence and business addresses of the
president, vice president, secretary, treasurer and general manager, if any, of the corporation; and the names and city and state of residence and business addresses of each stockholder of the corporation owning or holding at least ten percent of the capital stock thereof;

(4) A statement of whether the vendor is acting as agent for some other individual, firm or corporation, and if so, a statement of the principal authorizing the representation shall be attached to the affidavit or whether the vendor is doing business as another entity;

(5) The vendor's latest Dun & Bradstreet rating, if there is any rating as to the vendor; and

(6) A list of one or more banking institutions to serve as references for the vendor.

(b) Whenever a change occurs in the information submitted as required, the change shall be reported immediately in the same manner as required in the original disclosure affidavit.

(c) The affidavit and information received by the director shall be kept in a register of vendors which shall be a public record and open to public inspection during regular business hours in the director's office and made readily available to the public.

(d) The director may waive the above requirements in the case of any corporation listed on any nationally recognized stock exchange and in the case of any vendor who or which is the sole source for the commodity in question.

(e) Any person who makes an affidavit falsely or who knowingly files or causes to be filed with the director, an
affidavit containing a false statement of a material fact or
omitting any material fact, is guilty of a misdemeanor, and,
upon conviction, shall be fined not more than one thousand
dollars, and, in the discretion of the court, confined in jail not
more than one year. An individual convicted of a
misdemeanor under this subsection may never hold an office
of honor, trust or profit in this state, or serve as a juror.

§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;

(6) Selling the commodities to the general public at the posted price or 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; or

(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 sale to the general public or 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 organization 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 nontransferrable 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.

(c) 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.
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 act approved this the 27th day of ________, 2008.

Governor