WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2010

ENROLLED

House Bill No. 4582

(By Delegates Campbell, Guthrie, Hatfield, Phillips, M. Poling, Kominar, White, Craig, Marshall, Spencer and Mahan)

Passed March 13, 2010

In Effect From Passage
AN ACT to repeal §5A-3-14, §5A-3-21, §5A-3-22, §5A-3-23, §5A-3-24, §5A-3-25, §5A-3-26, §5A-3-37a, §5A-3-38, §5A-3-39, §5A-3-40, §5A-3-41, §5A-3-42, §5A-3-54, §5A-3-55 and §5A-3-55a of the Code of West Virginia, 1931, as amended; and to amend and reenact §5A-3-1, §5A-3-2, §5A-3-3, §5A-3-4, §5A-3-12, §5A-3-18, §5A-3-36 and §5A-3-37 of said code; and to amend said code by adding thereto a new section, designated §5A-3-59, relating to the functions of the purchasing director; procurement process; exempting certain entities from the Division of Purchasing; clarifying that the judicial branch is exempt from the Division of Purchasing; documentation of inventory; transportation of surplus property; providing resident vendor preference to certified small, women and minority-owned businesses; providing definitions; and providing rule-making authority.

Be it enacted by the Legislature of West Virginia:

That §5A-3-14, §5A-3-21, §5A-3-22, §5A-3-23, §5A-3-24, §5A-3-25, §5A-3-26, §5A-3-37a, §5A-3-38, §5A-3-39, §5A-3-40, §5A-3-41, §5A-3-42, §5A-3-54, §5A-3-55 and §5A-3-55a of the
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Code of West Virginia, 1931, as amended, be repealed; that §5A-3-1, §5A-3-2, §5A-3-3, §5A-3-4, §5A-3-12, §5A-3-18, §5A-3-36 and §5A-3-37 of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §5A-3-59, all to read as follows:

ARTICLE 3. PURCHASING DIVISION.

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

(a) The Purchasing Division within the Department of Administration is continued for the purpose of establishing centralized offices to provide purchasing, and travel services to the various state agencies.

(b) The director of the Purchasing Division shall, at the time of appointment:

(1) Be a graduate of an accredited college or university; and

(2) Have 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.

(c) 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.

(d) The provisions of this article do not apply to the judicial branch, the legislative branch, to purchases of stock made by the Alcohol Beverage Control Commissioner, and to purchases of textbooks for the State Board of Education.
§5A-3-2. Books and records of director.

The director shall keep accurate books, accounts and records of all transactions of his or her division, and such books, accounts and records shall be public records and shall at all proper times be available for inspection by any taxpayer of the state.

§5A-3-3. Powers and duties of director of purchasing.

The director, under the direction and supervision of the secretary, shall be the executive officer of the Purchasing Division and shall have the power and duty to:

(1) Direct the activities and employees of the Purchasing Division;

(2) Ensure that the purchase of or contract for commodities shall be based, whenever possible, on competitive bid;

(3) Purchase or contract for, in the name of the state, the commodities and printing required by the spending units of the state government;

(4) Apply and enforce standard specifications established in accordance with section five of this article as hereinafter provided;

(5) Transfer to or between spending units or sell commodities that are surplus, obsolete or unused as hereinafter provided;

(6) Have charge of central storerooms for the supply of spending units, as the director deems advisable;

(7) Establish and maintain a laboratory for the testing of commodities and make use of existing facilities in state
institutions for that purpose as hereinafter provided, as the
director deems advisable;

(8) Suspend the right and privilege of a vendor to bid on
state purchases when the director has evidence that such
vendor has violated any of the provisions of the purchasing
law or the rules and regulations of the director;

(9) Examine the provisions and terms of every contract
entered into for and on behalf of the State of West Virginia
that impose any obligation upon the state to pay any sums of
money for commodities or services and approve each such
contract as to such provisions and terms; and the duty of
examination and approval herein set forth does not supersede
the responsibility and duty of the Attorney General to
approve such contracts as to form: *Provided*, That the
provisions of this subdivision do not apply in any respect
whatever to construction or repair contracts entered into by
the Division of Highways of the Department of Transportation:
*Provided, however*, That the provisions of this subdivision do
not apply in any respect whatever to contracts entered into by
the University of West Virginia Board of Trustees or by the
Board of Directors of the State College System, except to the
extent that such boards request the facilities and services of
the director under the provisions of this subdivision; and

(10) Assure that the specifications and commodity
descriptions in all “requests for quotations” are prepared so
as to permit all potential suppliers-vendors who can meet the
requirements of the state an opportunity to bid and to assure
that the specifications and descriptions do not favor a
particular brand or vendor. If the director determines that
any such specifications or descriptions as written favor a
particular brand or vendor or if it is decided, either before or
after the bids are opened, that a commodity having different
specifications or quality or in different quantity can be
bought, the director may rewrite the “requests for quotations” and the matter shall be rebid.

§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 emergencies and prescribe the manner in which such purchases shall be made and reported to the 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 and type 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 $125 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, as determined by the director;

(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 $1 million, 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 the 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;

(13) Provide such other matters as may be necessary to give effect to the foregoing rules and the provisions of this article; and
(14) Prescribe procedures for encumbering purchase orders to ensure that the proper account may be encumbered before sending purchase orders to vendors.

(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 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-3-12. Prequalification disclosure and payment of annual fee by vendors required; form and contents; register of vendors; false certificates; 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 a certificate of the vendor or the certificate of a member of the vendor’s firm or, if the vendor is a corporation, the certificate 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 certificate or whether the vendor is doing business as another entity;

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

(6) A list of one or more banking institution, if such institution is available, to serve as references for the vendor; and

(7) The vendor’s tax identification number.

(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 certificate.
(c) The certificate and information received by the director shall be public record.

(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 submits a false certificate or who knowingly files or causes to be filed with the director, a certificate 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 $1,000, 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-3-18. Substituting for commodity bearing particular trade name or brand.

If a spending unit requests the purchase of a commodity bearing a particular trade name or brand, the director may substitute a commodity bearing a different trade name or brand, if the substituted commodity reasonably conforms to the adopted standard specifications and can be obtained at an equal or lower price.

§5A-3-36. Inventory of removable property.

The director has the power and duty to make and keep current an inventory of all removable property belonging to the state. Such inventory shall be kept on file in the office of the director as a public record. The inventory shall disclose the name and address of the vendor, the date of purchase, the price paid for the property therein described and the disposition thereof.
§5A-3-37. Preference for resident vendors; preference for vendors employing state residents; preference for veteran residents; exceptions.

(a) Effective beginning July 1, 1992, in any instance that a purchase of commodities or printing by the director or by a state department is required under the provisions of this article to be made upon competitive bids, the successful bid shall be determined as provided in this section. The Secretary of the Department of Revenue shall promulgate any rules necessary to: (i) Determine that vendors have met the residence requirements described in this section; (ii) establish the procedure for vendors to certify the residency requirements at the time of submitting their bids; (iii) establish a procedure to audit bids which make a claim for preference permitted by this section and to reject noncomplying bids; and (iv) otherwise accomplish the objectives of this section. In prescribing the rules, the secretary shall use a strict construction of the residence requirements set forth in this section. For purposes of this section, a successful bid shall be determined and accepted as follows:

(1) From an individual resident vendor who has resided in West Virginia continuously for the four years immediately preceding the date on which the bid is submitted or from a partnership, association, corporation resident vendor, or from a corporation nonresident vendor which has an affiliate or subsidiary which employs a minimum of one hundred state residents and which has maintained its headquarters or principal place of business within West Virginia continuously for four years immediately preceding the date on which the bid is submitted, if the vendor’s bid does not exceed the lowest qualified bid from a nonresident vendor by more than two and one-half percent of the latter bid, and if the vendor has made written claim for the preference at the time the bid was submitted: Provided, That for purposes of this
subdivision, any partnership, association or corporation resident vendor of this state, which does not meet the requirements of this subdivision solely because of the continuous four-year residence requirement, shall be considered to meet the requirement if at least eighty percent of the ownership interest of the resident vendor is held by another individual, partnership, association or corporation resident vendor who otherwise meets the requirements of this subdivision, including the continuous four-year residency requirement: Provided, however, That the Secretary of the Department of Revenue shall promulgate rules relating to attribution of ownership among several resident vendors for purposes of determining the eighty percent ownership requirement; or

(2) From a resident vendor, if, for purposes of producing or distributing the commodities or completing the project which is the subject of the vendor's bid and continuously over the entire term of the project, on average at least seventy-five percent of the vendor's employees are residents of West Virginia who have resided in the state continuously for the two immediately preceding years, and the vendor's bid does not exceed the lowest qualified bid from a nonresident vendor by more than two and one-half percent of the latter bid, and if the vendor has certified the residency requirements of this subdivision and made written claim for the preference, at the time the bid was submitted; or

(3) From a nonresident vendor, which employs a minimum of one hundred state residents or a nonresident vendor which has an affiliate or subsidiary which maintains its headquarters or principal place of business within West Virginia and which employs a minimum of one hundred state residents, if, for purposes of producing or distributing the commodities or completing the project which is the subject of the vendor's bid and continuously over the entire term of
the project, on average at least seventy-five percent of the
vendor's employees or the vendor's affiliate's or subsidiary's
employees are residents of West Virginia who have resided
in the state continuously for the two immediately preceding
years and the vendor's bid does not exceed the lowest
qualified bid from a nonresident vendor by more than two
and one-half percent of the latter bid, and if the vendor has
certified the residency requirements of this subdivision and
made written claim for the preference, at the time the bid was
submitted; or

(4) From a vendor who meets either the requirements of
both subdivisions (1) and (2) of this subsection or
subdivisions (1) and (3) of this subsection, if the bid does not
exceed the lowest qualified bid from a nonresident vendor by
more than five percent of the latter bid, and if the vendor has
certified the residency requirements above and made written
claim for the preference at the time the bid was submitted; or

(5) From an individual resident vendor who is a veteran
of the United States Armed Forces, the Reserves or the
National Guard and has resided in West Virginia
continuously for the four years immediately preceding the
date on which the bid is submitted, if the vendor's bid does
not exceed the lowest qualified bid from a nonresident
vendor by more than three and one-half percent of the latter
bid, and if the vendor has made written claim for the
preference at the time the bid was submitted; or

(6) From a resident vendor who is a veteran of the United
States Armed Forces, the Reserves or the National Guard, if,
for purposes of producing or distributing the commodities or
completing the project which is the subject of the vendor's
bid and continuously over the entire term of the project, on
average at least seventy-five percent of the vendor's
employees are residents of West Virginia who have resided
in the state continuously for the two immediately preceding
years and the vendor's bid does not exceed the lowest
qualified bid from a nonresident vendor by more than three
and one-half percent of the latter bid, and if the vendor has
certified the residency requirements of this subdivision and
made written claim for the preference, at the time the bid was
submitted; or

(7) Notwithstanding any provisions of subdivisions (1),
(2), (3), (4), (5) or (6) of this subsection to the contrary, if
any nonresident vendor that is bidding on the purchase of
commodities or printing by the director or by a state
department is also certified as a small, women or minority-
owned business pursuant to section fifty-nine of this article,
the nonresident vendor shall be provided the same preference
made available to any resident vendor under the provisions
of this subsection.

(b) If the Secretary of the Department of Revenue
determines under any audit procedure that a vendor who
received a preference under this section fails to continue to
meet the requirements for the preference at any time during
the term of the project for which the preference was received
the secretary may: (1) Reject the vendor's bid; or (2) assess
a penalty against the vendor of not more than five percent of
the vendor's bid on the project.

(c) Political subdivisions of the state including county
boards of education may grant the same preferences to any
vendor of this state who has made a written claim for the
preference at the time a bid is submitted, but for the purposes
of this subsection, in determining the lowest bid, any political
subdivision shall exclude from the bid the amount of business
occupation taxes which must be paid by a resident vendor to
any municipality within the county comprising or located
within the political subdivision as a result of being awarded
the contract which is the object of the bid; in the case of a bid received by a municipality, the municipality shall exclude only the business and occupation taxes as will be paid to the municipality: Provided, That prior to soliciting any competitive bids, any political subdivision may, by majority vote of all its members in a public meeting where all the votes are recorded, elect not to exclude from the bid the amount of business and occupation taxes as provided in this subsection.

(d) If any of the requirements or provisions set forth in this section jeopardize the receipt of federal funds, then the requirement or provisions are void and of no force and effect for that specific project.

(e) If any provision or clause of this section or application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(f) This section may be cited as the "Jobs for West Virginians Act of 1990."

§5A-3-59. Small, women and minority-owned businesses.

(a) As used in this section:

(1) "Minority individual" means an individual who is a citizen of the United States or a noncitizen who is in full compliance with United States immigration law and who satisfies one or more of the following definitions:

(A) "African American" means a person having origins in any of the original peoples of Africa and who is regarded
as such by the community of which this person claims to be a part.

(B) “Asian American” means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands, including, but not limited to, Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.

(C) “Hispanic American” means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.

(D) “Native American” means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

(2) “Minority-owned business” means a business concern that is at least fifty-one percent owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least fifty-one percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

(3) “Small business” means a business, independently owned or operated by one or more persons who are citizens
of the United States or noncitizens who are in full compliance
with United States immigration law, which, together with
affiliates, has two hundred fifty or fewer employees, or
average annual gross receipts of $10 million or less averaged
over the previous three years.

(4) "State agency" means any authority, board,
department, instrumentality, institution, agency, or other unit
of state government. "State agency" does not include any
county, city or town.

(5) "Women-owned business" means a business concern
that is at least fifty-one percent owned by one or more
women who are citizens of the United States or noncitizens
who are in full compliance with United States immigration
law, or in the case of a corporation, partnership or limited
liability company or other entity, at least fifty-one percent of
the equity ownership interest is owned by one or more
women who are citizens of the United States or noncitizens
who are in full compliance with United States immigration
law, and both the management and daily business operations
are controlled by one or more women who are citizens of the
United States or noncitizens who are in full compliance with
United States immigration law.

(b) State agencies shall submit annual progress reports on
small, women and minority-owned business procurement to
the Department of Administration in a form specified by the
Department of Administration.

(c) The Department of Administration shall propose
rules, for legislative approval pursuant to article three,
chapter twenty-nine-a, to implement certification programs
for small, women and minority-owned businesses. These
certification programs shall deny certification to vendors
from states that deny like certifications to West Virginia-
based small, women or minority-owned businesses or that
provide a preference for small, women or minority-owned
businesses based in that state that is not available to West
Virginia-based businesses. The rules shall:

(1) Establish minimum requirements for certification of
small, women and minority-owned businesses;

(2) Provide a process for evaluating existing local, state,
private sector and federal certification programs that meet the
minimum requirements; and

(3) Mandate certification, without any additional
paperwork or fee, of any prospective state vendor that has
obtained certification under any certification program that is
determined to meet the minimum requirements established in
the regulations.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

[Signature]

Chairman House Committee

[Signature]

Originating in the House.

In effect from passage.

Clerk of the Senate

[Signature]

Clerk of the House of Delegates

[Signature]

President of the Senate

[Signature]

Speaker of the House of Delegates

[Signature]

The within is approved this the _____ day of __________, 2010.

Governor

[Signature]
PRESENTED TO THE GOVERNOR

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Time 5:50